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Supreme Court, U.S.
FILED

No. ____

95-1298 FEB 6 - 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: INFOTECHNOLOGY, INC., A Delaware Corporation,

Debtor.

JOHN S. ABELES; EARL W. BRIAN; DWIGHT W. GEDULDIG; JOHN E. KOONCE; WALLACE O. SELLERS; PAUL STEINLE; and JOHN BERENTSON,

Petitioners,

—v.—

INFOTECHNOLOGY, INC.,

Debtor-Respondent,

PENSION BENEFIT GUARANTY CORPORATION and AVACUS PARTNERS, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Debtor Infotechnology, Inc.'s ("Infotech") plan of reorganization was approved by the bankruptcy court in violation of section 1129(a)(3) of the Bankruptcy Code, 11 U.S.C. § 1129(a)(3), the notice requirements of Bankruptcy Rule 9019(a) and the petitioners' due process rights under the Fifth Amendment, where the reorganization plan contains as its centerpiece a settlement of litigation with a creditor pursuant to a stipulation and order which was "so ordered" by the Bankruptcy Court without prior notice to interested parties, including the petitioners.

2. Whether the Bankruptcy Court abused its discretion and failed to apply the standard set forth by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968), when it approved as part of the plan of reorganization, Infotech's settlement of claims by the Pension Benefit Guaranty Corporation alleging that Infotech was part of United Press International's "controlled group" for purposes of liability for UPI's pension plan obligations pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1362(a).

LIST OF THE PARTIES' AFFILIATES

All parties appear in the caption of the case on the cover page. The petitioners are individuals. The respondent's affiliates are:

Infotechnology, Inc.
Questech Capital Corporation
United Press International
Financial News Network
Comtex Scientific Corporation
Telecommunications Industries, Inc.
American Cytogenetics, Inc.
Hadron, Inc.
Data Broadcasting corporation
IncSTAR Corporation

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PETITION FOR A WRIT OF CERTIORARI

John S. Abeles, Earl W. Brian, Dwight W. Geduldig, John E. Koonce, Wallace O. Sellers, Paul Steinle, and John Berenston respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-6a) dated November 9, 1995 is unreported. The order of the District Court (App., *infra*, 7a) is dated March 6, 1995. The Bankruptcy Court's order confirming the debtor's plan of reorganization is dated June 21, 1994. (App., *infra*, 8a-17a).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on November 9, 1995 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1129(a)(3) of the Bankruptcy Code, 11 U.S.C. § 1129(a)(3), provides that a Chapter 11 plan can only be confirmed "if the plan has been proposed in good faith and not by a means forbidden by the law."

Bankruptcy Rule 9019 provides that a bankruptcy court may only approve a compromise or settlement upon motion and after notice and a hearing.

The Due Process Clause of the Fifth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law.

Section 4062(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1362(a), imposes joint and several liability for a pension plan's underfunding upon any person who is, on the termination date of a pension plan, a contributing sponsor of the pension plan, or in such a sponsor's "controlled group."

Section 4001(a)(14) of ERISA, 29 U.S.C. § 1301(a)(14), provides that two business organizations are within the same "controlled group" if the organizations are under "common control" within the meaning of Treasury Department regulations adopted under sections 414(b) and (c) of the Internal Revenue Code. 29 C.F.R. § 2612.2

As relevant here, sections 414(b) and (c) of the Internal Revenue Code provide that two companies are under common control if one has a direct or indirect ownership interest of 80 percent or more in the other.

STATEMENT OF FACTS

This Writ of Certiorari involves the unlawful manner in which the Chapter 11 bankruptcy of Infotechnology, Inc. ("Infotech" or "the Debtor") was concluded. Specifically, this Writ seeks permission to prosecute an appeal from the Second Circuit's affirmance of the order by the District Court affirming the order of the Bankruptcy Court confirming the Debtor's plan of reorganization.

On March 5, 1991, Infotech and its wholly-owned subsidiary Questech Capital Corp. each filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States District Court for the Southern District of New York (Conrad, J.). Each of Infotech and Questech continued in the operation and management of its business as a debtor-in-possession.

On January 31, 1994, Infotech filed a plan of reorganization (the "Plan") together with a related disclosure statement, its two prior efforts to formulate a plan of reorganization and disclosure statement having been rejected by the Bankruptcy Court. Pursuant to an order dated April 18, 1994, the Bankruptcy Court approved the disclosure statement and, *inter alia*, authorized its transmittal and scheduled a hearing to consider the confirmation.

A. The Directors' Indemnification Rights

Each of the petitioners (collectively, the "Director-petitioners") was a member of the Board of Directors of Infotech at various times prior to the filing of its Chapter 11 petition on March 5, 1991. As directors, each of the Director-petitioners became entitled to indemnification by Infotech, pursuant both to Article VIII of the Certificate of Incorporation of Infotech and the Amended and Restated By-Laws of Infotech, against certain claims asserted against them by reason of their service as directors.

In addition to the indemnification provisions in the Certificate of Incorporation and By-Laws, in March 1989, Infotech entered into indemnity agreements with its directors in order to induce the directors to continue in office. Infotech's obligations to each of the Director-petitioners under the indemnity agreements included any amounts paid for damages, judgments, settlements and costs, costs of investigation and costs of defense of legal actions, claims or proceedings brought against a director by reason of his service to Infotech.

Each of the Director-petitioners filed a proof of claim in the Infotech bankruptcy to enforce their indemnification rights against the Debtor. In their proofs of claim, each of the Director-petitioners sought, among other things, indemnification for expenses (including attorney's fees) actually incurred by the Director-petitioners prior to the filing of Infotech's bankruptcy petition in the defense of a derivative action titled *Avacus Partners, L.P. v. Earl W. Brian, M.D. et. al.*, Civil Action No. 11001, pending in the Delaware Chancery Court (the "Derivative Suit"). The proofs of claim also sought indemnification of amounts to be incurred in the future in connection with the defense of the Derivative Suit and other legal actions pending against the Director-petitioners in their capacity as directors or former directors of Infotech.

B. The Avacus Litigation

Avacus Partners, L.P. ("Avacus") is a shareholder of Infotech. In 1989, prior to Infotech's bankruptcy filing, Avacus commenced the Derivative Suit in the Delaware Chancery Court against Infotech and five of its present or former directors who are the Director-petitioners herein. Avacus, which was the beneficial owner of approximately 7.47% of Infotech common stock, challenged two transactions which were accomplished in February and March of 1989—Infotech's acquisition of the right to control United Press International, Inc. ("UPI") and of a controlling interest in Comtex Scientific Corp. ("Comtex"). Avacus alleged that these transactions were undertaken by the Infotech Board in order to enrich and entrench the Board and to thwart a potential takeover of Infotech by Avacus or others, and that the individual defendants thereby breached their fiduciary duties as directors of Infotech.

Avacus' lawsuit came on the heels of its unsuccessful attempt to mount a hostile tender offer for Infotech. The Infotech Board established a special committee of independent Board members to investigate Avacus' claims. After conducting a thorough review of Avacus' claims with the assistance of independent Delaware counsel, the special committee concluded that there was no basis for those claims. However, after an unsuccessful motion to dismiss and limited discovery, the prosecution of the Derivative Suit was stayed by the filing of Infotech's bankruptcy petition.

C. The Avacus Stipulation

In the Infotech bankruptcy, Avacus filed a proof of claim in which it asserted both the claims set forth in the Derivative Suit and other claims as a member of a class of Infotech shareholders set forth in an unrelated shareholders' class action that had been filed in the United States District Court for the Central District of California. The portion of the Ava-

cus proof of claim relating to the class action was barred pursuant to the settlement of the class action. The portion of the claim relating to the Derivative Suit was the subject of the unlawful settlement embodied in the so-called "Avacus Stipulation" discussed below.

Despite the absence of any liquidated proof of claim, or of any evaluation of the merit of its claims, Avacus managed to secure for itself in the Infotech bankruptcy the right to prosecute and control the Derivative Suit in the Delaware Chancery Court subsequent to Infotech's reorganization. Avacus also obtained the right to retain fifty percent of the proceeds of the Derivative Action if successful, which is a potential windfall recovery that offers Avacus a greater recovery than it would be entitled to under Delaware law, or that it would have received had Infotech never filed for bankruptcy.

This preferential treatment of Avacus' claims was accomplished through the incorporation into the Plan of a stipulation between Avacus and Infotech (the "Avacus Stipulation"), which was negotiated in secret and approved and "so ordered" by the Bankruptcy Court on November 22, 1993, without any hearing or opportunity for interested parties to be heard. Indeed, the Avacus Stipulation was negotiated with the participation of the Bankruptcy Court in chambers. No motion was made by the Debtor for approval of the Avacus Stipulation and no notice of any kind was ever provided to interested parties prior to the Bankruptcy Court's November 22, 1993 approval of the settlement.

The Avacus Stipulation was first presented to the creditors of Infotech, including the Director-petitioners, as a *fait accompli* in the disclosure statement which accompanied the proposed Plan. The Avacus Stipulation severely impacts upon the Director-petitioners' property rights. First, the Avacus Stipulation strips reorganized Infotech of the ability to control the Derivative Suit and places such control squarely in the hands of Avacus—a shareholder of Infotech with its own

agenda which may be inconsistent with the best interests of the Debtor.

Second, after placing control of the Derivative Suit in the hands of Avacus and offering Avacus the bounty of fifty percent of any recovery therein, the Avacus Stipulation effectively eliminates the Director-petitioners' indemnity rights. Under Delaware law (Del. Corp. Law § 145), directors may only be indemnified for attorney's fees and costs, not for judgments, on derivative claims. By limiting the indemnification of present and former directors and officers to indemnification only for the amount of judgments against such directors (assuming their liability was not the result of a failure to act in good faith, gross negligence, or willful misconduct) and specifically excluding any indemnification or reimbursement of the legal fees of such directors, the Avacus Stipulation will result in the elimination of the Director-petitioners' rights to seek indemnity if the Derivative Suit goes forward in Delaware. There is no question, therefore, that the Avacus Stipulation severely impacts upon the Director-petitioners.

D. The PBGC Settlement

Another key feature of the Plan is the incorporation into the Plan of a settlement with the Pension Benefit Guaranty Corporation ("PBGC"), Infotech's largest purported creditor. This settlement, which like the Avacus Stipulation was reached without notice to other interested parties, is embodied in the so called "PBGC Term Sheet". The PBGC Term Sheet is an integral part of the Plan.

The PBGC filed two contingent proofs of claim in the Infotech Chapter 11 case. The PBGC's claims seek to hold Infotech responsible under allegedly applicable provisions of the Employment Retirement Security Act of 1974 ("ERISA"), for the payment of alleged unfunded pension plan liabilities of UPI. The PBGC claims that Infotech is legally responsible

for approximately $9,000,000 in unfunded UPI pension plan benefit liabilities because Infotech is either a "contributing sponsor" of the pension plan, or a member of UPI"s "controlled group," within the meaning of the relevant statutes and regulations.

The Debtor's settlement with the PBGC is significant for it grants the PBGC almost fifty percent of the common stock equity in reorganized Infotech, together with notes and warrants.

The UPI pension plan had not been "terminated" as of the date the Bankruptcy Court held the hearing to consider confirmation of the Infotech reorganization plan. A pension plan's termination date is significant under ERISA in that it marks the date on which the benefits of plan participants cease to accrue. What is critical here is that the liability of the employer is also triggered and determined at the time a plan is terminated. The failure of the PBGC to terminate the UPI pension plan as of the date of the Bankruptcy Court's hearing to consider confirmation of the reorganization plan made it impossible for the Bankruptcy Court to properly evaluate the PBGC's contention that Infotech was in UPI's "controlled group."

E. Proceedings Below

On June 8, 1994, the Director-petitioners filed their objection to confirmation of the Plan. On June 21, 1994, the Bankruptcy Court held a short hearing to consider the objections to the Plan by the Director-petitioners and others and, on the same day, an order was entered in the United States Bankruptcy Court for the Southern District of New York by Judge Francis G. Conrad confirming the Debtor's Plan. (App., *infra*, 8a-17a).

The Director-petitioners appealed the Bankruptcy Court's order confirming the Plan to the District Court pursuant to 28 U.S.C. § 158(d), which provides district courts of the United

States jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges. The District Court, by an order dated March 6, 1995, affirmed the Bankruptcy Court's order confirming the Debtor's Plan. (App., *infra*, 7a).

The District Court held that because the Director-petitioners ultimately were provided with a copy of the disclosure statement and Plan containing the "so ordered" Avacus Stipulation, and given notice of the hearing to consider confirmation of the Plan, there was no violation of Bankruptcy Rule 9019 or of the Director-petitioners' due process rights. The District Court also found that the Bankruptcy Court did not abuse its discretion in approving the Avacus Stipulation and the PBGC Term Sheet.

The Director-petitioners appealed the District Court's order to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 158(d). The Second Circuit affirmed the decision of the District Court, by summary order dated November 9, 1995. (App., *infra*, 1a-6a). The Court of Appeals held that it was not improper for the Bankruptcy Court to have "so ordered" the November 1993 Avacus Stipulation without prior notice, finding that the stipulation "was binding only as between Avacus and Infotech, the only parties to the stipulation, and was expressly conditioned upon confirmation of the plan by final order of the Court." The Court further found that "even if there were any error in the Bankruptcy Court's approval of the Avacus Stipulation, such error was harmless." (App., *infra*, 3a).

Despite the fact that it is uncontested that the Debtor did not comply with the prior notice and motion requirement of Bankruptcy Rule 9019, the Court of Appeals also rejected the Director-petitioners' due process claim, stating that "[s]ince appellants concede that compliance with Rule 9019 provides all the process that is due, appellants' claim that they were denied due process fails." (App., *infra*, 3a).

With respect to the Director-petitioners' objections to the PBGC settlement, the Court of Appeals, citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968) ("TMT Trailer"), recognized that a bankruptcy court is required to make an "informed and independent" judgment as to whether proposed compromises are fair and equitable. However, the Court held that Infotech made a reasonable business judgment when it agreed to the settlement and the Bankruptcy Court did not abuse its discretion when it approved the settlement notwithstanding that the date of the termination of the UPI pension plan was unknown. (App., *infra*, 4a-5a). The Court of Appeals did not reach the question of whether the "eighty percent" ownership test is a bright-line test dispositive of the issue of controlling person liability under ERISA. (App., *infra*, 6a).

REASONS FOR GRANTING THE PETITION

This case involves the virtual nullification by the parties, sanctioned by the courts below, of a Bankruptcy Rule which, to ensure that interested parties' due process rights are protected, requires prior notice to interested parties of any compromise or settlement before approval by the bankruptcy court. This case is an opportunity for the Court to provide guidance to the bankruptcy courts, as the Court has done before. *See City of New York v. Saper*, 336 U.S. 328 (1949). Moreover, the decision below is erroneous, and the issue that it addresses concerns an important procedural protection for the rights of creditors and other interested parties in bankruptcy proceedings.

This case also presents the Court with an opportunity to clarify the application of the law, discussed in *TMT Trailer*, 390 U.S. 414, 424, which requires bankruptcy courts to exercise their "informed, independent judgment" when determining whether proposed compromises forming part of a reorganization plan are fair and equitable. Here, where the record reveals that the Bankruptcy Court merely gave lip ser-

vice to the *TMT Trailer* analysis, the Court has the opportunity to more precisely define the role of the bankruptcy court, particularly as to whether the bankruptcy court's reliance upon the alleged business judgment of the debtor satisfies the bankruptcy court's duty to review settlements.

A. THIS CASE CONCERNS IMPORTANT ISSUES INVOLVING FEDERAL STATUTES AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE CONSTITUTION

This case involves the interpretation of Section 1129(a)(3) of the Bankruptcy Code and Bankruptcy Rule 9019. Section 1129(a)(3) of the Bankruptcy Code, 11 U.S.C. § 1129(a)(3), provides that a Chapter 11 plan can only be confirmed if "the plan has been proposed in good faith and not by a means forbidden by law." Bankruptcy Rule 9019 requires that only "after notice and a hearing, may the court approve a compromise or settlement." Rule 9019 thereby protects the due process interests of interested parties in bankruptcy proceedings.

Section 2075 of Title 28 of the United States Code, 28 U.S.C. § 2075, (entitled "Bankruptcy Rules"), specifically provides the Supreme Court's power to prescribe the general rules, the forms of process, writs, pleading, and motions, and the practice and procedure in cases under Title 11.

It is important for this Court to address whether Rule 9019 requires prior notice to interested parties of a settlement, and particularly whether a bankruptcy court acts improperly if it fails to require a formal motion upon notice to interested parties before it approves a settlement that affects their property rights. The application of Rule 9019 by Bankruptcy Court Judges is part of almost every bankruptcy case, and thus, such questions are likely to arise frequently.

This Court has already determined that the rights of creditors, such as the rights the Director-petitioners asserted in this case, are property interests. In *City of New York v. New*

York, New Haven & Hartford Railroad Co., 344 U.S. 293 (1953), this Court determined that creditors' rights in bankruptcy cases are property interests that are protected by the Fifth Amendment and that cannot be impaired without notice and an opportunity to be heard.

Bankruptcy Rule 9019 specifically protects such creditors' rights. However, in this case both the District Court and the Second Circuit found that the Bankruptcy Court's failure to provide the Director-petitioners with notice of the Avacus Settlement before it made the settlement an order of the court by "so-ordering" it, was not a violation of Rule 9019 or the Director-petitioners' due process rights. The lower courts held that because the Director-petitioners were ultimately provided with a copy of the disclosure statement containing the stipulation and given notice of the hearing to consider confirmation of Infotech's reorganization plan, the failure to comply with Bankruptcy Rule 9019 was of no consequence.

The decisions of District Court and the Second Circuit vitiate the procedural protections set forth in the Bankruptcy Rules. The courts below have held in essence that the secret settlement process used in the Bankruptcy Court is acceptable even though the Avacus Stipulation adversely impacts upon the property rights of the Director-petitioners and they had no right to make a timely objection to the Avacus Stipulation before the Bankruptcy Court "so ordered" the settlement.

This Court has held that the due process clause of the Fifth Amendment requires provision of a hearing "at a meaningful time." *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). This Court has not yet addressed whether notice provided to creditors only after a settlement that affects their rights has been "so ordered" by the bankruptcy court is notice "at a meaningful time."

The Director-petitioners respectfully submit that the risk of erroneous deprivation of creditors' rights posed by the procedures used in this case is great. Through the failure to apply

the procedural protections afforded by Bankruptcy Rule 9019(a), the Director-petitioners were totally excluded from a process which resulted in the Bankruptcy Court's approval of a settlement for inclusion in a reorganization plan. Although that settlement strips the Director-petitioners of valuable indemnity rights, their only opportunity to be heard with respect to it came after the Bankruptcy Court had passed upon it.

It cannot fairly be said that providing the Director-petitioners with notice of the hearing to consider confirmation of the entire Infotech reorganization plan constitutes notice of the Avacus settlement "at a meaningful time." By the time of the confirmation hearing in June, 1994, there was little chance of obtaining a meaningful evaluation by the Bankruptcy Court of the Avacus Stipulation that had been "so-ordered" in November, 1993 and become an integral part of the Plan. This is particularly true because the Bankruptcy Judge himself had participated in crafting the settlement. By depriving the Director-petitioners of the opportunity to be heard before the Bankruptcy Judge "so-ordered" the stipulation, the Director-petitioners were deprived of a meaningful opportunity to enlighten the Bankruptcy Court as to the relative merits of the settlement, the problems posed by the Avacus stipulation and the impact of it upon these Director-petitioners. Thus, the impact on these petitioners of the disregard of their right to prior notice of the approval of the settlement was substantial.

Finally, there is obviously a great interest on the part of the Government in affording procedural fairness where the proceedings concern the deprivation of a citizen's property interest. In comparison, the fiscal and administrative burden of requiring notice to creditors *before* a bankruptcy court approves of a settlement is slight. Indeed, Bankruptcy Rule 9019(a) already reflects the balancing of interests in favor of prior notice. We respectfully submit that the incorporation of a settlement into a reorganization plan after it has been

approved by the bankruptcy court does not satisfy the requirements of that balancing of interests.

B. THE DECISIONS OF THE LOWER COURTS ARE IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT

The Court of Appeal's decision in this case is in direct conflict with this Court's holding in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968) ("*TMT Trailer*"), which requires a bankruptcy court "to determine that a proposed compromise forming part of a reorganization plan is fair and equitable" and that "there can be no informed and independent judgment as to whether proposed compromise is fair and equitable until the bankruptcy judge has apprised himself or herself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Id.* at 424. This Court in *TMT Trailer* emphasized that "it is essential that every important determination in a reorganization proceeding receive the informed, independent judgment of the bankruptcy court." *Id.*

The issue of the application of the *TMT Trailer* standard arises in this case in the context of the Bankruptcy Court's approval of the settlement between the Debtor and the PBGC. The settlement of the PBGC's claim that Infotech is responsible for funding UPI's pension plan rests on the PBGC's argument that Infotech is part of UPI's "controlled group" for purposes of Section 4062(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. Section 1362(a). Pursuant to that section, any person, who is, *on the termination date* of the plan, a contributing sponsor or in such a sponsor's controlled group, is jointly and severally liable for the pension plan's underfunding. The proposed settlement of the PBGC's claim could only be fairly evaluated by the Bankruptcy Court if the Bankruptcy Court had considered all relevant information concerning the

strength of the PBGC's position that Infotech was in UPI's "controlled group."

At the time of the hearing to consider confirmation of Infotech's reorganization Plan, which included as a key element the PBGC Term Sheet, the PBGC had not terminated the UPI pension plan. The failure of the PBGC to terminate the UPI pension plan as of the date of the confirmation hearing made it impossible for the Bankruptcy Court to properly evaluate the PBGC's contention that Infotech was in UPI's "controlled group." Thus, it was impossible for the Bankruptcy Court to make the required "informed and independent judgment" as to whether the proposed compromise of the PBGC's claims forming part of the reorganization plan was fair and equitable.

Under section 4001(a)(14) of ERISA, two business organizations are within the same "controlled group" if the organizations are under "common control" within the meaning of Treasury Department regulations adopted under sections 414(b) and (c) of the Internal Revenue Code. 29 U.S.C. § 1301(a)(14). As relevant here, those regulations provide that two companies are under common control if one has a direct or indirect ownership interest of 80 percent or more in the other.

The Director-petitioners objected to the PBGC settlement at the confirmation hearing and explained that neither the Bankruptcy Court nor the Debtor properly analyzed the control issues in the light of the PBGC's failure to terminate the UPI Plan as of the date of confirmation. (App., *infra*, 34a). This is because different points in time have different implications for Infotech with regard to Infotech's alleged control of UPI.

A review of the record in the Bankruptcy Court reveals that the Bankruptcy Court did not inform itself of the facts necessary to determine whether Infotech was responsible as a matter of law for UPI's pension plan obligations. There was

no thorough analysis of the settlement as is required by *TMT Trailer*. Instead, the Bankruptcy Court erroneously based its belief that Infotech was in UPI's "controlled group" upon the "knowledge" it gained form its handling of the UPI bankruptcy proceedings. The Bankruptcy Court improperly took judicial notice of this critical information notwithstanding the fact that it was the subject of dispute. (App., *infra*, 34a).

The Court of Appeals held that the Bankruptcy Court did not abuse its discretion when it approved the PBGC settlement because the Bankruptcy Court did not need to know the termination date of the UPI plan to approve the parties' compromise. According to the Court of Appeals, it was sufficient for the Bankruptcy Court to rely on the business judgment of the Debtor that it would likely be found liable to the PBGC.

The Court of Appeals' holding seemingly is in direct conflict with the decision of this Court in *TMT Trailer*, where this Court stated:

> It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.

390 U.S. at 434.

It is important for the Court to clarify the standard set forth in *TMT Trailer*. As the Court explained in that case, "[t]he fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a Bankruptcy Court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable." 390 U.S. at 430. By granting certiorari in this case, this Court will have an opportunity to resolve the tension between blind adherence to the Debtor's business

judgment and the necessary independent judgment to be applied by bankruptcy courts when evaluating settlements pursuant to *TMT Trailer*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed November 9, 1995
Docket No. 95-5024

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ninth day of November, one thousand nine hundred and ninety-five.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge.
HONORABLE FRANK X. ALTIMARI,
HONORABLE JOSEPH M. MCLAUGHLIN,
Circuit Judges.

In Re: INFOTECHNOLOGY, INC., a Delaware Corporation,

Debtor,

JOHN S. ABELES; EARL W. BRIAN; DWIGHT W. GEDULDIG; JOHN E. KOONCE; WALLACE O. SELLERS; PAUL STEINLE; and JOHN BERENTSON,

Appellants,

—v.—

INFOTECHNOLOGY, INC.,

Debtor-Appellee,

PENSION BENEFIT GUARANTY CORPORATION
and AVACUS PARTNERS, L.P.,

Appellees.

APPEARING FOR APPELLANTS: Lawrence S. Hirsh, Reid & Priest, New York, N.Y.

APPEARING FOR APPELLEES: Joshua J. Angel, Angel & Frankel, New York, N.Y.

Tracy Rickett, Pension Benefit Guaranty Corp., Washington, D.C.

Paul N. Silverman, Andrews & Kurth, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Lewis A. Kaplan, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Appellants, former directors of the debtor-appellee Infotechnology, Inc. ("Infotech"), appeal from the March 7, 1995, judgment of the District Court, which affirmed the June 23, 1994, order of the Bankruptcy Court confirming the Debtor's Third Plan of Reorganization (the "Plan"). Appellants contend that the incorporation into the Plan of the "Avacus Stipulation" and the "Pension Benefit Guaranty Corporation ('PBGC') Term Sheet," which settled claims by, respectively, Avacus Partners, L.P. and the PBGC, violated 11

U.S.C. § 1129(a)(3), the notice requirements of Bankruptcy Rule 9019, and the appellants' due process rights. Appellants advance various other objections to the Bankruptcy Court's approval of the PBGC settlement.

1. The Avacus Stipulation, as finally approved in connection with confirmation of the debtor's reorganization plan, limited the indemnity rights of the appellants, who are Avacus directors. Based on their view that the Bankruptcy Court approved the merits of the Avacus Stipulation in November 1993 when it "so-ordered" the settlement, appellants argue that the reorganization plan was approved in violation of Bankruptcy Rule 9019, thereby violating 11 U.S.C. § 1129(a)(3). However, the November 1993 ruling was a preliminary order, binding only as between Avacus and Infotech, the only parties to the stipulation, and was expressly conditioned upon confirmation of the plan by final order of the Court. Such a ruling was not improper. Moreover, we agree with the District Court that, even if there were any error in the Bankruptcy Court's approval of the Avacus Stipulation, such error was harmless. As a result of the settlement, the Debtor resolved a claim against the Estate and was absolved of all expenses relating to a lawsuit that it found not worthy of pursuit, yet was guaranteed fifty percent of the recovery if the lawsuit succeeded. To reject such a favorable settlement would have been an abuse of discretion on the part of the Bankruptcy Court.

Since appellants concede that compliance with Rule 9019 provides all the process that is due, appellants' claim that they were denied due process fails. Moreover, appellants' property interests were not impaired until after the Confirmation Hearing, by which time they had received notice and a hearing, thus granting them all the process they were due.

2. Appellants make a parallel claim and argument that the PBGC Term Sheet was incorporated into the Plan in violation of Bankruptcy Rule 9019 and due process, even though the settlement was simply an agreement in principle between the

Debtor and PBGC and was not subject to a "so-ordered" ruling by the Bankruptcy Court. This argument has no merit. Rule 9019 requires notice and a hearing only for *court-approved* compromises, and so is inapplicable to the PBGC settlement. *See* Bankr. R. 9019. In addition, the PBGC settlement was contingent upon a confirmed plan, and thus any alleged impairment of property rights did not occur until after the Confirmation Hearing, by which time appellants had received all the process that was due.

Because the PBGC had not selected a termination date for the UPI Pension Plan as of the date the Court confirmed the Infotech Reorganization Plan, appellants contend that the Bankruptcy Court confirmed the Plan without assessing whether Infotech was within UPI's controlled group on the relevant date. A bankruptcy court is required to make an "informed and independent" judgment as to whether proposed compromises are fair and equitable. *See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S. Ct. 1157, 1163 (1968). In reviewing proposed settlements, the Bankruptcy Court's role is not to substitute its business judgment for that of the debtor-in-possession, *Depo v. Chase Lincoln First Bank. N.A.*, 77 B.R. 381, 384 (N.D.N.Y. 1987) (stating that courts should respect the business judgment of the trustee), *aff'd*, 863 F.2d 45 (2d Cir. 1988); *see also Kalb, Voorhis & Co. v. American Financial Corp.*, 8 F.3d 130, 132 n.1 (2d Cir. 1993) (equating the rights, powers, and duties of debtors-in-possession with those of trustees), but only to determine "whether the settlement 'fall[s] below the lowest point in the range of reasonableness.' " *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), *cert. denied*, 409 U.S. 1039, 93 S. Ct. 521 (1972)), *cert. denied*, 464 U.S. 822, 104 S. Ct. 89 (1983).

In establishing the termination date, only the interests of PBGC and the plan participants are taken into consideration. *See In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 652 (2d Cir. 1983). Knowing it

had no legal role in selecting the plan termination date, Infotech made a reasonable business judgment that the termination date selected would likely be a date during which time Infotech was liable for the Pension Plan. The Bankruptcy Court did not abuse its discretion in approving the compromise, based on its decision that Infotech's assessment of the risk of liability was reasonable.

Appellants argue that the only information the Bankruptcy Court relied on in assessing whether Infotech was within UPI's controlled group were facts inappropriately gleaned from the Court's handling of the UPI bankruptcy. While the Bankruptcy Court mentioned its involvement in the UPI bankruptcy, appellants have not demonstrated that the Court relied on such knowledge in making its rulings. The Bankruptcy Court played an active role in resolving the PBGC dispute with Infotech and was completely familiar with the facts and circumstances of the PBGC settlement. The mere mention of its involvement in the UPI bankruptcy does not render its handling of the Infotech proceedings improper. Furthermore, the only additional fact appellants list as necessary for an informed decision by the Court is a fixed date for plan termination. The Court did not need to know that date in order to approve the compromise.

Appellants contend that Infotech was not in the UPI controlled group, and thus the compromise was not fair and equitable. Under ERISA, two business organizations are within the same controlled group if the organizations are under "common control" within the meaning of Treasury Regulations adopted under sections 414(b) and (c) of the Internal Revenue Code. 29 U.S.C. § 1301(a)(14). Those Treasury Regulations provide that two companies are under common control if one has a direct or indirect ownership interest of eighty percent or more in the other. Treas. Reg. § 1.414(c)-2(b)(2). As of June 27, 1992, the date the Pension Plan was terminated, Infotech controlled ninety-nine percent of the voting stock of UPI. In *PBGC v. East Dayton Tool and Die*, 14 F.3d 1122, 1126-27 (6th Cir.), *cert. denied*, 115 S. Ct. 73 (1994),

the Sixth Circuit held that the eighty percent test was a bright-line test and dispositive of the issue of control. Whether or not we would agree with that holding, Infotech exercised reasonable business judgment, in light of this decision, in determining that a settlement was in its best interests because of the substantial likelihood that it would be held liable for the Pension Plan under the eighty percent test. The Court's approval was proper.

Appellants argue that the PBGC's agreement with the UPI Bankruptcy Trustee to terminate the UPI Pension Plan was invalid, because such agreement had to be made with the UPI Plan Administrator. However, document tendered by the PBGC establish that amendments to the UPI Pension Plan, coupled with the resignations of the Pension Board members, made the UPI Bankruptcy Trustee the Plan Administrator. Since the authenticity of these documents is not challenged, we grant the PBGC's motion to supplement the record with these documents, and conclude that the agreement to terminate the Pension Plan was validly concluded with the appropriate party.

JON O. NEWMAN
Chief Judge.

FRANK X. ALTIMARI (per J.O.N.)

JOSEPH M. MCLAUGHLIN (per J.O.N.)
Circuit Judges.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed March 7, 1995
94 Civ. 6201 (LAK)

In re:

INFOTECHNOLOGY, INC., a Delaware corporation,

Debtor.

ORDER

John H. Abeles, Earl W. Brian, Dwight W. Geduldig, John E. Koonce, Wallace Sellers, Mercury Partners, Paul Steinle, and John F. Berentson having appealed from the order of the Bankruptcy Court, dated June 21, 1994, which confirmed the Debtor's plan of reorganization, and the Court having considered the submissions of the parties and heard argument, it is hereby

ORDERED that the order appealed from is affirmed in all respects for the reasons stated in open court.

Dated: March 6, 1995

LEWIS A. KAPLAN
Lewis A. Kaplan
United States District Judge

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and Questech Capital Corporation
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Filed June 23, 1994
Case No. 91 B 10970 (FGC)

In re: INFOTECHNOLOGY, INC.,
a Delaware Corporation,

Debtor.

Case No. 91 B 10971 (FGC)

In re: QUESTECH CAPITAL CORPORATION,
a Delaware Corporation,

Debtor.

ORDER CONFIRMING DEBTORS' THIRD JOINT PLAN OF REORGANIZATION (A&F #48)

Infotechnology Inc. ("Infotech") and Questech Capital Corporation ("Questech"), debtors and debtors-in-possession (the "Debtors"), having filed their voluntary petitions for relief under Chapter 11 of Title 11, United States Code (the "Bankruptcy Code") on March 5, 1991 (the "Filing Date"); and a third joint plan of reorganization (the "Plan") having been filed on January 31, 1994; and the Debtors joint disclosure statement (the "Disclosure Statement") having been filed on January 31, 1994 and an order (the "Scheduling Order") having been signed by this Court on February 1, 1994 which scheduled the hearing to consider the Disclosure Statement on March 10, 1994; and a hearing having been held before this Court on March 10, 1994 on notice to all interested parties pursuant to Section 1125 of the Bankruptcy Code to consider the adequacy of the information contained in the Disclosure Statement; and upon modifications to the Debtors' Disclosure Statement and Third Joint Plan of Reorganization having been incorporated and submitted to this Court; and upon the Order of this Court dated April 18, 1994 which, among other things:

(1) approved the Disclosure Statement dated March 30, 1994 as containing adequate information about the Plan;

(2) authorized the transmittal, on or before May 2, 1994 of the Disclosure Statement, Plan, and copy of the Court's Order dated April 18, 1994; and

(3) authorized the transmittal on or before June 3, 1994 of approved ballots to interested parties entitled to vote on the Plan; and

the solicitation of acceptances or rejections of the Plan having been made within the time and in the manner required by this Court; and the acceptances or rejections of the Plan hav-

ing been received, tallied and filed with this Court; and a hearing on confirmation of the Plan (the "Confirmation Hearing") having been held and concluded before this Court on June 21, 1994 upon proper and timely notice in accordance with Section 1128 of the Bankruptcy Code; and it appearing that all interested parties have received proper notice of the Confirmation Hearing; and upon the record made before me; and upon the pleadings and proceedings held in this case; and after hearing Angel & Frankel, P.C., counsel to the Debtors, in support of the confirmation of the Plan; and objections of Mercury Partners, Paul Steinle, John Berentson and John Abeles, Earl Brian, Dwight W. Geduldig, John Koonce, and Wallace Sellers having been heard and overruled; and due deliberation having been had; and sufficient cause appearing to me therefor; and

IT APPEARING, that the Plan has been duly accepted in good faith and in accordance with the provisions of Section 1126 of the Bankruptcy Code; and

IT FURTHER APPEARING, and the Court having determined and found, after notice and a hearing that:

(a) All persons, entities and governmental agencies entitled or required to receive notice of the Plan have received due, proper and adequate notice of the hearings on the adequacy of the Disclosure Statement and the Hearing on Confirmation of the Plan.

(b) The procedures by which the ballot was distributed and tabulated were fair, properly conducted and complied with the Disclosure Statement Order dated April 18, 1994.

(c) The Plan complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

(d) The Debtors as the proponent of the Plan, have complied with the applicable provisions of the Bankruptcy Code regarding both the Plan and the Disclosure Statement.

(e) The Plan has been proposed in good faith and not by any means forbidden by law.

(f) The Plan specifies the classes of claims and classes of interests not impaired under the Plan. Infotech classes not impaired are Class 1, 2, 3, and 4. Questech classes of claims not impaired under the Plan are Classes, 1, 2, and 3.

(g) The Plan identifies the Classes of Claims impaired under the Plan and specifies the treatment of Claims in such Classes. Infotech Classes 5, 6, 7, 8, and 9 are impaired under the Plan. Questech Classes 4, 5, and 6 are also impaired under the Plan.

(h) (i) The Debtors have disclosed the identity and affiliation of those individuals proposed to serve, after confirmation of the Plan, as directors or officers of the Debtors; and the appointment to, or continuance in, such office of such individual is consistent with the interest of creditors and equity security holders and with public policy; and

(ii) The Debtors have disclosed the identity of any insider who will be employed or retained by the reorganized Debtors.

(i) The treatment under the Plan of claims (if any) of the type specified in Section 507 of the Bankruptcy Code complies with the provisions of Section 1129(a)(9) of the Bankruptcy Code.

(j) (i) Any payment made or promised to be made by the Debtors for services or for costs and expenses in, or in connection with their cases, or in connection with the Plan and incident to their cases, has been disclosed to this Court; and

(ii) Any such payment made before confirmation of the Plan is reasonable, or if such payment is to be fixed upon or after confirmation of the Plan, such pay-

ment is subject to the approval of the Court as soon as reasonable.

(k) No government regulatory commission has jurisdiction over the rates of the Debtors.

(l) With respect to each impaired Class of Claims designated by the Plan, each holder of a Claim of such Class has accepted the Plan, or will receive or retain under the Plan, on account of such Claim, property of a value that is not less than the amount such holder would so receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on the Confirmation Date of the Plan.

(m) Each Class of Claims as set forth in the Plan has accepted the Plan, has been deemed to accept, the Plan, or is not impaired under the Plan.

(n) The Plan is feasible. The Debtors have demonstrated that there is a reasonable prospect of (i) their being able to meet the financial obligations imposed under the plan without the need for further liquidation or financial arrangements and (ii) the Debtors being able to execute and deliver all documents, agreements and/or instruments provided for under the Plan and/or required by applicable law to consummate the transactions and conveyances contemplated by the Plan.

(o) Confirmation of the Plan is not likely to be followed by liquidation, or the need for further financial reorganization of the Debtors or any successor to the Debtors under the Plan.

(p) All fees payable under Section 1930 of the Bankruptcy Code, as determined by the Court on the Confirmation Date, have been paid, or the Plan provides for the payment of all such fees on the Effective Date or upon such other terms as may be agreed upon by the parties; it is

NOW, on motion of Angel & Frankel, P.C., attorneys for the Debtors,

(q) The settlement contained in the Avacus Stipulation and Order is fair and reasonable and in the Debtors' business judgment is in the best interests of the estate.

(r) The claims arising out of the subject matter of the Avacus lawsuit, and the value thereof to the Debtors' estate and its creditors, have not been affected by an Order of this Court in this Chapter 11 case or in any case matter therein or by any release purported to be given by the Debtor after the Petition Date in connection with the settlement of any other action(s) involving the Debtor.

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The findings set forth above are hereby incorporated and shall be an Order of this Court.

2. The Plan filed with the Court dated March 30, 1994 be, and the same hereby is, approved and confirmed in all respects as having fulfilled the requirements of the Bankruptcy Code, including Section 1129 thereof.

3. Distributions required to be made to the holders of claims against the Debtors shall be made as provided in the Plan.

4. The Debtors be, and hereby are, authorized to take all necessary steps to effectuate consummation of the Plan, all in conformity with the terms of the Plan.

5. The Plan and its provisions shall be binding upon the Debtors, any entity acquiring or receiving property of the Debtors under the Plan, any lessor or lessee of property to or from the Debtors, and any holder of Claims of the Debtors, whether or not the Claim held by such holders of Claims or such shareholder is impaired under the Plan and whether or not such Claimant or entity has accepted the Plan.

6. Except as otherwise provided in Section 1141(d) of the Bankruptcy Code or the Plan, the Debtors be, and hereby are, discharged from any debt (as such term is defined in Section 101(12) of the Bankruptcy Code), liquidated or unliquidated, asserted or unasserted, that arose before the Confirmation Date, including, without limitation, any debt in respect of any Claim and any debt of a kind specified in Section 502(g), (h) or (i) of the Bankruptcy Code, whether or not:

(a) a proof of Claim based on such debt has been filed or deemed filed under the Bankruptcy Code;

(b) such Claim is allowed under the Bankruptcy Code;

(c) the holder of such Claim has accepted the Plan;

provided, however, that the holders of debts for administrative expenses incurred in the ordinary course of business of the Debtor, and which administrative expenses have not otherwise been satisfied prior to the Effective Date, shall not be so discharged until they are paid according to their respective terms and further, provided, however that any future awards of compensation and expenses under Sections 330 and 503(b) of the Bankruptcy Code shall not be affected or discharged by this order.

7. Any judgment at any time obtained that is a determination of the liability of the Debtors with respect to any debt discharged under this Order, is declared to be null and void. All entities which are parties to adversary proceedings and/or contested matters pending before this Court, which proceedings are not fully determined as of the date hereof, are restrained and enjoined from commencing any other proceedings or taking any other action against the Debtors with respect to any issue raised in such adversary proceedings or contested matters, except upon further order of this Court, or as otherwise provided for in the Plan.

8. Except as provided for by the Plan or this order, the commencement or continuation of any action, the employment of

process, or the taking of any act to collect, recover or offset any debt discharged pursuant to this order as a liability or obligation of the Debtors, or of property of the Debtors, is forever stayed, enjoined and restrained.

9. All property, assets and effects of the Debtors be, and they hereby are, vested in the Debtors, free and clear of all Claims and interests of Claimants, other than valid and subsisting liens existing as of the date hereof that are to remain unaffected pursuant to the Plan, and the Debtors be, and hereby are, authorized and empowered to operate their business and manage their property without further order of the Court.

10. This Court hereby retains jurisdiction for the purposes provided in the Plan, and for such purposes as may be necessary to aid in the confirmation, consummation and implementation of the Plan, including

(a) determination of any and all Disputed Claims or disputed interests, including any objections to claims filed on or before the Effective Date;

(b) determination of any and all applications for administrative or post-confirmation compensation for professional or similar fees rendered to the Debtors during the administration of the case;

(c) determination of any and all applications, adversary proceedings and contested or litigated matters;

(d) allowance, disallowance, estimation, liquidation or determination of any Claims against the Debtor and entry or enforcement of any order requiring the filing of any such Claim on or before a particular date;

(e) modification of the Plan or remedy of any defect or omission or reconciliation of any inconsistency in the order of the Court confirming the Plan to the extent authorized by the Bankruptcy Code;

(f) enforcement or construction of any or all of the provisions of the Plan.

11. Notice of entry of this order, substantially in the form of the notice annexed hereto as Exhibit "A", shall be, and the same hereby is, deemed sufficient if mailed by first class mail, postage prepaid, on or before a date that is fifteen (15) business days from the date of entry of this Order to all known holders of Claims against the Debtors on the Confirmation Date, and to all entities who have requested notices in this case at their last known addresses, and the notice substantially in the form of the notice annexed hereto as Exhibit "B", shall be, and the same hereby is, deemed sufficient if mailed by first class mail, postage prepaid, on or before a date that is fifteen (15) business days from the date of entry of this Order to all record shareholders of the Debtors, provided, however, that the Debtors shall not be required to transmit said documents to any entity whose correct address they have been unable to determine, and further provided, however, that the Debtors may, at their option, send only one such notice to any given address.

12. Inasmuch as the Effective Date is required to occur no more than sixty (60) days after the Confirmation Date, the report required by Local Bankruptcy Rule 58 to be filed with the clerk within ninety (90) days after entry of the order confirming the Debtors' cases shall be filed and served within ninety (90) days after the entry of such order.

13. This Court hereby further retains jurisdiction of these proceedings pursuant to and for the purposes of Sections 105(a), 1127 and 1142 of the Code and for such purposes as may be necessary or useful to aid the confirmation and consummation of the Plan and implementation of the Plan.

14. The Avacus Stipulation and Order is approved in all respects.

Dated: New York, New York
June 21, 1994

[ILLEGIBLE]
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 91 B 10970

In the Matter of
INFOTECHNOLOGY INC.,

Debtor.

June 21, 1994

United States Custom House
One Bowling Green
New York, New York 10004

Plan Confirmation.

BEFORE:

HON. FRANCIS G. CONRAD,
Bankruptcy Judge.

[2] APPEARANCES:

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—and—

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—and—

BY: PETER GOODMAN, ESQ., of Counsel

—and—

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PROCEEDINGS

THE COURT: Mr. Angel.

MR. ANGEL: Good morning, your Honor. If Your Honor please, three years ago almost to the day I started what I thought was the easiest case I have been privileged to get in many years in my [5] office and after three grueling years I find myself, hopefully at the verge of confirmation, which is what I suspect it's all about, so I will address myself to the confirmation if I may.

If Your Honor please, there have been three objections that were filed to the confirmation of the plan. One objection we did not respond to. The reason we did not respond to it is that the objector is not a claimant and we have pointed it out to the objector, and indeed there is an Order in the stipulation previously signed by the objector wherein they indicated they

would withdraw any of their claims against the Debtor and indeed that claim has been expunged.

THE COURT: Which objector?

MR. ANGEL: American Community Services.

We pointed out to them that you are part of the class, you have been let into the class and what was required in the stipulation has indeed happened, so we did not bother responding to that.

THE COURT: is there any representing American Community Services?

(No response.)

[6] THE COURT: I thought they were resolved in .he FNN case?

MR. ANGEL: Exactly, Your Honor, and they are part of the class in the settlement, the overall litigation.

THE COURT: On the basis of the fact they have not even bothered to appear, their objection is overruled.

MR. ANGEL: Okay. Then we have two other objections. We have an objection of Mercury Partners, Paul Steinle and John F. Berentson and we have indeed responded to that objection, and I would like to address myself to it.

In fact, it's the sort of objection that permeates into the next objection, but has to be met head on. That is there is the assertion that the stipulation of settlement with Avacus is somehow violative either of due process or of the requirements of Rule 9019 for the settlement of controversy.

As we put in our response to that objection, we state clearly that the objector really should read the stipulation, because when you read the Avacus stipulation, what is clear is that all [7] that happened in that stipulation was that on an interim basis, with the approval of the Court, the Debtor and the objector, at that point Avacus, settled the controversies between themselves on an interim basis. The agreement is that we would do warfare no more and that we would enter into a

settlement, which, of course, was conditioned in its entirety upon the Plan of Reorganization of the company being approved and the stipulation being a part of that plan.

Indeed, what greater opportunity for notice and to be heard can one have with regard to the controversy and then the incorporation in the plan, the very clear language that we used in the Disclosure Statement identifying the conflict, identifying the proposed settlement and granting to all concerned an opportunity to be heard, an objection thereto and a further objection to the voting on the plan.

Indeed, the very essence of what the Second Circuit gave me an—what do you call it, they stopped me many years ago when I attempted to sell a major asset of a company known as Lionel and they said we have a plan and when you have such [8] important things you must do that, unless you can show it's an emergency, you must do it in the context of a plan, and indeed that is what we have done with Avacus.

So the repsonse in the first instance to the objection of Mercury Partners is that there certainly has been no attempt to deny due process.

THE COURT: Who speaks for Mercury Partners?

MR. TRIGGS: I do, Your Honor. I entered my appearance and have given the court reporter who I am and who I represent.

How would you like me to handle this, respond when he's finish?

Also there have been other responses to my papers.

THE COURT: Why don't we hear from the people who are opposing you and then I will listen to what you have to say.

MR. TRIGGS: Thank you, Your Honor.

THE COURT: It's their burden.

MR. TRIGGS: I understand that.

MR. ANGEL: The second thrust of the objection of Mercury Partners is that it is [9] inequitable somehow to the unse-

cured creditors and shareholders to Infotech to have concluded the arrangement that we have concluded with Avacus regarding the settlement of both the Avacus claim and the continuation of the Avacus lawsuit.

So we have to look at it—I mean the Debtor has made it clear to the Court that anybody who wanted to listen to the Debtor, the Debtor's evaluation of the Avacus lawsuit, the Debtor made it clear that the Debtor would not and could not spend its own funds to continue that lawsuit going forward and yet the Debtor had to be cognizant of the concern of the Court and the position of Avacus that there was merit in the lawsuit.

So, we eventually crafted what should be recognized by all concerned as a win, win situation.

Win, win, why? Win, win in the first instance because the cost and expense of prosecuting the lawsuit and the risk evolves to Avacus, not to the Debtor. The Debtor has to use its resources to run its business. It's not in the lawsuit business.

If on the other hand there is any return that comes out of the Avacus lawsuit, once **[10]** Avacus enjoys a return to itself of the expenses that it had in the prosecution of the lawsuit after July 9th of 1993, and I'll tell you why that's important in a minute, then there is a sharing between the Debtor and Avacus of the proceeds of that lawsuit and if any of the creditors had opted, they could have shared in it on a pro rata basis.

The voting of the plan was the creditors who voted did not opt but to a part of the proceeds of the lawsuit, but the creditors who did not vote on the plan automatically, by the terms of the plan, would enjoy it.

But the key to it, Your Honor, is the following. The key to it is that the lawsuit will be looked at by the forum that's in charge of that lawsuit, i.e. the Delaware Court.

The lawsuit if it is advanced is advanced at an expense out-of-pocket of Avacus, no expense whatsoever to the Debtor, and three, if there is any recovery to be had, the recovery,

once the expenses of the prosecution of the lawsuit have been returned to Avacus, are shared equally between the Debtor and Avacus.

Therefore, the Debtor is unable to [11] understand why this is inequitable to the unsecured creditors and shareholders.

As Your Honor knows, in the settlement of a controversy—and clearly there was a controversy between the Debtor and Avacus, there was a controversy regarding the claim that Avacus filed in their proceeding and certainly with regard to the conduct of the Debtor's affairs.

The settlement of that controversy, the Courts have long since used the business judgment test and I can't think of anything that is a clearer enunciation of the business judgment test than the type of settlement that is crafted, and as Your Honor knows, under very different circumstances with Avacus.

Finally, I believe that there is a claim that the vesting of the authority in Avacus to prosecute the derivative suit is somehow contrary to

THE COURT: Let's go on to something else.

MR. ANGEL: That is the response. I have now responded to the Mercury objection.

THE COURT: Do you have anything to [12] add?

MR. SILVERSTEIN: I will be brief. Mr. Angel covered points as to the win, win situation. I think as Your Honor will recall, in earlier plans and Disclosure Statements the Debtor was unwilling—the Debtor essentially wanted to dismiss the Avacus lawsuit.

The Avacus stipulation was a much tortured litigation to get a result that would be a win, win situation for the Debtor.

As far as the three points that Mercury raises, clearly this is not a secret settlement, Mr. Angel touched upon that and I think answered that.

With respect to the vesting that's a proposition and 1123 authorized that. With respect to the fairness, I think the TMT Trailer standards set forth by the United States Supreme Court have been satisfied in all respects and I think the settlement and revolution is in all respects fair.

THE COURT: Sir?

MR. TRIGGS: My name is John Triggs and I represent the three individuals whose appearance is on the record.

THE COURT: You are representing **[13]** Mercury Partners, Paul Steinle and John F. Berentson?

MR. TRIGGS: Yes. I'll try to be brief. I understand where I'm standing three years into a process with a plan and all of the work, and I just want to ask Your Honor not to stop but slow down for a second and I have one point to make other than what's in the papers and what you have seen back and forth.

THE COURT: I want you to understand something. Mr. Angel has had nothing but a tortured process in order to get here. That doesn't mean he's over the hurdles yet, so I want to hear what you have to say.

MR. TRIGGS: I understand, but I'm aware of the realities and how hard everyone worked to get here and I'm a fly in this particular process, but I have one other thing I want to say to Your Honor and I think I heard Your Honor correctly when he talked about the point that I made about Delaware law.

Let me suggest to you there is another issue here that Your Honor should at least consider and I'll give you an example of why I think you should consider that.

[14] What you have here is a lawsuit as we know originally for a variety of reasons, rightfully or wrongfully, Infotechnology decided to prosecute through an independent counsel.

What you have in the normal circumstances for Avacus is the right for them to make that determination again. If the

independent counsel looks at this and says there is nothing here maybe there is some merit, but all we are going to serve to do is bankrupt people already bankrupt and we should not go forward with it, it makes a lot of sense just to stop.

Now, the reason why not just Delaware but most states like that process is the derivative action is a powerful tool, it is a special tool and what I would suggest to Your Honor is what should not happen is the imprimatur of this Court and you have the power to do all of this, I think that is clear, should not lend itself to a circumstance where, for example, it's possible that the agenda of Avacus is financial. It's not monetary, it is for whatever reason in the corporate world showing people you mess with me I crush you.

I would suggest to Your Honor the one **[15]** problem you should think about before you confirm this plan is the possibility that the sanity of this Court, and all it stands for and all the power that you have is being used to do something.

Judge, I'm not telling you the Debtor isn't going to get hurt, they are out, they walk away. They have given this valuable weapon to somebody else to use as they please.

I'm suggesting the normal checks and balances that Delaware Courts and most states would impose under these circumstances is gone as a result of this plan.

There is no chance for a Delaware Court to do anything about this if Your Honor confirms the plan is drafted, and all I am suggesting is that what you may be doing is just that.

THE COURT: Sir, how is the Delaware Court divested; is not Avacus suing in Delaware?

MR. TRIGGS: I would agree if it is clear on the record that the Delaware Court still could determine this is an inappropriate arrangement, I cannot say that's inappropriate.

If we are not collaterally estopped in Delaware from saying you can't do it this way—

[16] THE COURT: That's not what you are saying.

MR. SILVERSTEIN: Your Honor, we spent time on a number of pages in our response that Mr. Triggs received dealing with Delaware law.

Briefly, Mr. Luskin, our co-counsel, would like to address specifically the Delaware laws and maybe enlighten the Court and Mr. Triggs, because Mr. Triggs is off base on Delaware law.

THE COURT: Are you not saying that they are going to go sue someplace else? I thought the lawsuit was in Delaware?

MR. SILVERSTEIN: It's in Delaware.

THE COURT: I don't understand your concern. You are being sued or whoever your clients are are being sued in Delaware. Whatever protections you have there, you have there.

This settlement just simply authorizes them to go ahead and sue in Delaware Court.

MR. SILVERSTEIN: As the Delaware statute provides. Mr. Luskin, I think, needs to address that issue.

THE COURT: I wanted to clarify what he was saying about jurisdiction. I thought you were **[17]** going to some other Court?

MR. SILVERSTEIN: No.

MR. TRIGGS: That's not my understanding either, Your Honor. What I'm suggesting is that which normally could happen, i.e., the Debtor, because Infotechnology becomes Avacus, has a right to do a series of things.

If this Order doesn't preclude Avacus from having an independent committee and independent counsel take a look and says let's go no further, that's fine.

My point is if that check and balance is in there then I don't have much to complain about, but my sense of it is it's not, it's gone as a result of the deal that is made and if the plan as drafted is confirmed, and that's my point and my only point.

THE COURT: It seems the Debtor made their own independent judgment, they are the equivalent of the independent committee.

MR. TRIGGS: When the company had an independent committee and independent counsel look at this they didn't—they decided not to prosecute. I'm suggesting what's wrong with that happening at Avacus like they did at Infotechnology.

[18] What's wrong with an independent counsel taking a look at that. If that's available I cannot oppose the rest of the plan on the basis I have argued.

THE COURT: It seems to me, counsel, you could have and it would probably be no different for a Judge trying a case and a jury, one juror could decide one way and then you have twelve people and they could decide another way.

Here you had three different parties look at it. The independent committee said no lawsuit. The Debtor said no lawsuit and then after a negotiation Avacus says we think there should be a lawsuit, and that's the third view and the Debtor then said fine we will give it to you.

I think it's a matter of who looks at it.

MR. TRIGGS: Judge, I'm going to repeat myself one more time and I will take no more of your time, but my point about that is that Avacus has for reasons that frankly, because I don't have the full background, I looked at these papers, they are not clear to me, has somehow catapulted itself into a position somewhat better than the corporation would **[19]** have had.

It obviated the possibility that some independent third party could look at this and say why are you doing this, what is the agenda here.

If the agenda is something other than good old fashion money, it's just teaching people that you don't mess with me, I get even, I'll crush you kind of thing and if there is no hope of recovery, my suggestion, Your Honor, that I made at the outset is that this Court should not lend its imprimatur to that circumstance and that's the one point I want to make today.

If that isn't enough then I don't have anything else because the rest is in my papers, Your Honor, and I thank you for your time.

Mr. Luskin: Your Honor, I think it's worth a moment to establish the background of what went on in Delaware in the Avacus lawsuit before the case got here, and that is the director Defendants joined by the corporation after the case was filed, filed motions to dismiss and for summary judgment for failure to make demand upon the corporation.

They also had the independent counsel conduct an inquiry on the merits of the lawsuit. The **[20]** results of the independent counsel's report was submitted by Infotechnology in connection with the motion to dismiss for failure to make demands on the grounds that that independent committee's report demonstrated that because the suit was about merit, had demand been made, the corporation appropriately would have declined to go forward with the suit.

Rather than by that argument, Chancellor Allen in an extended opinion, which is part of the record of this case, denied the motion for summary judgment and said on the basis of the well pleaded facts in the Complaint and the facts that were already part of the record, there was considerable basis to find that the conduct of the directors violated the business judgment rule and therefore demand was excused.

Now, thereafter—and this was in October of 1990, Your Honor, thereafter Delaware law does provide a procedure known as a Sapota procedure where at that point a Board of Directors might come forward and make a motion to dismiss a case even where demand has been excused and at that point a Court in Delaware under Delaware law would not defer to that judgment but would have to exercise its own **[21]** independent business judgment to determine whether or not the suit would go forward.

Such a motion under Sapota is not mandatory, a corporation can decide after having taken the steps that Infotechnology did in their case, it's not appropriate to spring a Sapota motion.

In fact, Infotechnology did not do it. In the months following Allen's opinions when discovery was conducted on a full scale basis, Infotechnology had the option of coming forward using the independent committee's report and filing a Sapota motion which Chancellor Allen could have determined.

They declined to do so, and thereafter Infotechnology went into bankruptcy and the determination that the corporation has now made, which I think Mr. Angel expressed perfectly clearly, is that the corporation now regards their situation as a win, win situation contrary to the sort of circumstance where a corporation may decide that it is appropriate because of potential harm to it that it should bring a Sapota motion.

As Mr. Angel indicated, the corporation, the Debtor, in their case concluded the **[22]** opposite which is it's a win, win situation for the Debtor. Under those circumstances, neither law nor the Bankruptcy Court requires that the corporation maintain any control over the continuation of the lawsuit.

To the contrary Section 1123(b)(3) of the Code—Bankruptcy Code specifically contemplates that any asset of the Debtor including cause of action such as this one may be authority to prosecute that action, can be given to a designated representative of the Debtor, which in this case is precisely what Avacus is.

It is well established in the case law that that provison which would vest sole authority in Avacus to continue the lawsuit would pre-empt state law if there was a conflict.

In fact, Delaware law perfectly dovetails with the Bankruptcy Code in this situation. Rather than preclude a circumstance such as the Plan creates here, Section 303 of the Delaware Code provides where a corporation has gone into bankruptcy and filed a Plan of Reorganization and the Court authorizes either the Debtor or a Trustee or a representative to pursue any causes of action on **[23]** behalf of the Debtor, such actions will be deemed to be under Delaware law action by the corporation with unanimous consent of the shareholders and the Board.

In other words, far from precluding the result here which is allowing Avacus to go forward, have the corporation's claims heard on the merits in Delaware without any potential further interference by the Debtor or Avacus or any further entity.

Both the Bankruptcy Code and the Delaware code specifically contemplate that a result such as this would be blessed and that would be that.

In substance, Infotechnology had the opportunity to try and file a motion to stop this case after demand was excused. It declined to do so, it is not required to do so under Delaware law and the Bankruptcy Code and Delaware Code specifically contemplate the appointment of a representative such as Avacus with full authorization to prosecute the lawsuit to a conclusion as though it were unanimously consented to by the Board and the shareholders.

THE COURT: We had had objection to the settlement by Pension Guaranty?

MR. HIRSH: Your Honor, I think this would be an appropriate time for me to add a few **[24]** comments.

I represent the former directors who are the named Defendants as the Avacus lawsuit is now posed.

I heard a few things here this morning that I don't disagree with. One is no one is saying that this Debtor could not appoint Avacus to prosecute this lawsuit.

No one is saying that this Debtor when it comes out of reorganization is obligated to use the Sapota procedure that Delaware law provides for. What we are saying is why take that away from them? Why should Avacus be the arbiter of whether this case should go forward?

Discovery is not compete in the case and I submit to Your Honor that discovery in the case, which was conducted prior to this Debtor going into bankruptcy, does not substantiate the claims.

There was no summary judgment motion made by the Plaintiff, the case is not at that stage. What we are saying is don't take that right away from the company.

This is a derivative case that is supposed to be furthering the rights of the company. **[25]** Why take away the right of the company to examine whether it's really in its best interest to pursue this after we do some more discovery in Delaware.

That's the first point.

THE COURT: Counsel, isn't the purpose of a Court approved settlement under the Bankruptcy Code exactly that purpose? The Debtor makes their judgment as to whether they wish to sell, whether they wish to keep a lawsuit or not. Isn't that exactly what is happening?

MR. HIRSH: That is what's happening. I don't believe this Debtor is fairly in a position nor is this Court fairly in a position to judge now on the record we have to date in the Avacus lawsuit which was stopped by the filing of the bankruptcy on the record to date.

We don't know whether the Debtor might decide, you know, it's not in our best interest, we now examined more of the facts and we believe the Sapota procedure is appropriate.

I'm not saying the Debtor is going to do that, but it should have the option, this Court should not bar it from doing that.

THE COURT: Counsel, I'm not required **[26]** to have a mini trial on something just to see whether that settlement falls within a fair range, but that it does not go below a minimum, that's all I'm required to do.

MR. HIRSH: All I'm suggesting is don't bar this Debtor from exercising its rights under Sapota from going forward. Let the Delaware Court which hears these cases all the time and is going to hear this case apparently, let the Delaware Court decide that.

THE COURT: What else?

MR. HIRSH: The other point, if I may, we also think there is no reason to give this bounty to Avacus of fifty percent of the recovery.

Avacus, if I may suggest, doesn't need it as an incentive. It commenced this lawsuit in Delaware, prefiling, and it knew that all it would get there was a benefit to the corporation on the derivative claims. It will share in the damages if there are any by virtue of its position as a shareholder there and it may get its attorneys fees from the Delaware Court, that's what it will get.

That was enough incentive to go forward. Why are we here saying take fifty percent **[27]** of the recovery as well. I don't think there is any basis for that.

Mr. Angel's response is we settled this difficult warfare. I don't know what the warfare was, number one, we weren't on notice when the settlement happened but now that we are here now where was the warfare.

Avacus' claim for money damage which derived from the class action is out by virtue of the California class action settlement, where is the other claim?

They have this derivative case they want to pursue, they started the case prefiling, okay, the Court is going to let them pursue it postfiling. Do so, but don't give the fifty percent recovery, they don't need it.

THE COURT: You had objections to the Pension Benefit Guaranty?

MR. HIRSH: Yes. The objections are, number one, the term sheet which constitutes the settlement of the PBGC claims against the Debtor, I don't know when it was entered into or when this Court blessed that term sheet but we were not provided notice of it.

[28] I think the answer that this settlement and the Avacus settlement were in the Disclosure Statement, so you have all the due process, reads Rule 9019 out of the rules.

I don't know why it's there if the case is you can put this in a Disclosure Statement and at the end of the day when the steamroller of confirmation is rolling show up and object, I don't think that's right.

Putting that aside, the substance of the PBGC claim is that Infotechnology is liable for UPI's unfunded benefit plan. It could only be liable as I understand the law under ERISA is if it is in the controlled group.

The PBGC and ERISA utilize the Treasury regulations to determine when is a company in the same controlled group with the company that is directly liable on its plan.

Those regulations say that, well, one test we use is when there is eighty percent ownership; eighty percent of the voting power of the company. Then you are in the control group because you have the power presumably to control that company.

[29] We submit that Infotechnology does not have eighty percent of the voting power.

THE COURT: I think they have ninety-nine percent?

MR. HIRSH: I think that is incorrect. Our clients calculated Infotechnology has approximately seventy-six percent of the voting power in UPI.

That objection was never raised, we think it should have been raised.

THE COURT: Counsel, I'm handling the UPI cases and my understanding it's ninety-eight point something, I think it's ninety-nine percent from my knowledge as a judicial officer handling a related bankruptcy.

MR. HIRSH: I don't know that that information has ever been provided by UPI. I know recently Your Honor converted that case on the ground that inadequate disclosure had been made by UPI, the Debtors in Possession.

THE COURT: That wasn't the reason it was converted.

MR. HIRSH: I don't believe it's my burden to establish why it is less than eighty **[30]** percent. I will tell you our clients have calculated it to be less than eighty. I have not heard anything that substantiates why that's not right.

Maybe we can hear from the PBGC or the Debtor on it.

THE COURT: Who represents the PBGC, are they here?

MR. ANGEL: Before he does, I think out of fairness to the PBGC I should respond, Your Honor.

THE COURT: All right.

MR. ANGEL: If Your Honor recalls certainly as torturous as was our relationship with Avacus, clearly even more torturous was the relationship between the Debtor and the PBGC.

Finally about a year and a half ago when we did not appear to be making any progress we did put in an objection to the PBGC claim, and I will tell Your Honor that at that time at least a year and a half ago, maybe it's two years ago, we looked at the control group issue and we could not see any way around the control group. As far as we could see two years ago we were indeed members of the controlled group.

Once again as in the case of the Avacus [31] people, I'll get back to that in a minute, we made what we thought was a good business judgment in the settlement of the claim.

PBGC filed a claim against us which in various instances ran from a claim of administrative priority, to a claim for a priority in distribution, to finally a garden variety general unsecured claim.

Any way that you cut it open, we were facing claims between 10 and $12 million. We settled with the PBGC basically on the issuance of some shares and some notes that would be paid in time and to our mind was the best business deal that we could at the time cut.

I don't understand the argument of the controlled group quite candidly and it is something, obviously, that I as an attorney for the company would have had to look at, and we did look at it, albeit we have not looked at it in let's say a year and a half but we did look at it at that time.

Finally, just addressing ourselves to the settlement with the PBGC, the term sheet was exactly that. It was not a settlement approved by the Court, it merely was a settlement of the internecine warfare with the agreement between [32] ourselves and the PBGC that we would incorporate the terms of

that agreement in the plan. Certainly no different than what a Debtor does in any case with any group that raises its head in an attempt to get to a plan that is consensual.

You negotiate with them, put the terms of that negotiation in the plan and hope that everybody will approve the plan.

If the plan is not confirmed, there is nothing that is set in stone between—in terms of an agreement between ourselves and the PBGC.

We are back to square one, PBGC has a claim and the Debtor remains in Chapter 11 or some other chapter that probably has the seventh level of purgatory or better. I have been there and I don't want to visit again.

I think we did it in good faith. Clearly creditors and shareholders were given an opportunity not under a steamroller, but indeed in the context of a Disclosure Statement that very clearly enunciated what the agreement was and a plan that sets forth what the agreement does, an agreement which all groups had an opportunity to be heard on and an opportunity to vote in favor of.

[33] What could be better; that's exactly what we are required to do by Congress.

THE COURT: Counsel.

MR. RICKETT: Your Honor, I think what you had said earlier was absolutely right, and the information the agency always had is that Infotechnology owned ninety-nine percent of UPI and thus was brought into the control group, and subject to a liability for their underfunded pension plan.

What Mr. Angel has said is absolutely correct, the agency entered into long negotiations with the company and the PBGC and we reached a term sheet ultimately after numerous meetings with them and we believe that the settlement is fair.

The agency is taking quite a substantial hit on their claims, but we believe still that it's a fair settlement and we hope that the plan will be confirmed. Thank you.

MR. HIRSH: Your Honor, if I may, there is a concept on which the PBGC's claim is premised. That is in addition to

the controlled group liability they must terminate the UPI plan.

Termination under ERISA sets the date on which the company may be liable. The PBGC term **[34]** sheet provided that they would—I think it says take all reasonable steps consistent with Title 4 of ERISA to terminate the UPI pension plan as soon as practicable.

With all due respect, it's been over a year. I don't hear any reason why there has not been termination of that plan and in their papers the PBGC says sometime this summer we are going to terminate.

I don't understand the reason for that and I think that's quite specific.

THE COURT: Anything else?

MR. RICKETT: Your Honor, may I address the plan termination issue briefly?

THE COURT: Sure.

MR. RICKETT: The agency is moving to what we call an involuntarily termination of the UPI pension plan under Section 4042 of ERISA. That was made necessary by the fact that UPI did not initiate a distressed termination filing under Section 4041 of ERISA.

Therefore, part of the slowdown in that is that the agency has to initiate everything, get all the information, begin to move forward and also either sign an agreement with UPI or go to Court.

[35] Every reasonable expectation that we have right now is that the plan will be terminated sometime this summer.

I also would like to say that the term sheet that we signed is not predicated on the plan being terminated prior to plan confirmation. The two—it's not unusual to have plans confirmed sometimes years ahead of when the PBGC is even notified that something exists out there.

So we are moving ahead on the plan termination. Yes, that does set the liability, in all likelihood the plan termination effective date will be back at or near the UPI bankruptcy, that has to be determined, but it will be a retroactive determination

date which does not effect the PGBC's termination with Avacus.

THE COURT: Anything else, Mr. Angel, in reference to the objections?

MR. ANGEL: No, Your Honor.

THE COURT: Did you receive anything that I did not receive?

MR. ANGEL: No, Your Honor.

THE COURT: Unfortunately due to the shortage in the Clerk's Office of staff there is a [36] slowdown on the paperwork to the Judges.

MR. ANGEL: We have touched on each of the objections. I know it's not appropriate now, but virtually everyone has voted overwhelmingly in favor of this plan and even the objectors did not vote against the plan.

THE COURT: Is that correct, did your clients vote in favor of the plan?

MR. HIRSCH: They did not vote in favor of the plan.

MR. ANGEL: They did not vote against it.

MR. HIRSH: They didn't vote.

MR. SILVERSTEIN: In addition, I also believe that the objectors had the Debtor's objection to their claim resolved yesterday. With respect to the objections, Your Honor, we have submitted our responses and I think that we touched upon them, I don't need to be redundant on this point. I trust Your Honor has read them.

THE COURT: What's the report on the ballots?

MR. ANGEL: I believe the report is the ballots have been filed but every class has voted [37] overwhelmingly with regard to the Questech plan.

The SBA is here today, they voted in favor of the plan. The SBA is by far the largest creditor and nobody voted in opposition to that plan.

When we deal with the Infotechnology plan, each class that was entitled to vote voted overwhelmingly in favor of the plan. I don't believe that we got any votes in opposition?

VOICE: Your Honor, if you are looking for specific numbers, I have them.

THE COURT: They will be on file.

MR. ANGEL: It was just overwhelming. In fairness to Mr. Hirsch, Class 7 which is the indemnification class, a separate class that was set up to deal with the claims of the former Infotechnology directors with regard to indemnification, they did not vote in favor of the plan.

They, however, did not vote against the plan, and for voting purposes an Order was signed by the Court yesterday based upon a motion that we had made objecting to the claims agreeing that for voting purposes the claims would be perceived as zero.

THE COURT: That's correct.

[38] MR. ANGEL: That's the voting on the plan.

THE COURT: All right. If you were to produce evidence, because obviously the only objections are legal objections, if you were to place a witness on the stand, would your offer of proof be that this plan conforms with 1129(a)?

MR. ANGEL: Yes, Your Honor, and I have in Court today Dr. C.W. Gilluly. Dr. Gilluly is the President and Chairman of the Board of the Debtor company and he would be my witness, I would put him on the stand, he would make such an assertion.

Indeed prior to today and as late as this morning I met with Dr. Gilluly in my office and I explained to him the various standards and I said would you have any difficulty in saying to the Court that the standards could be met and he said no, I could say that.

THE COURT: Let me address the objections before we come to the plan of confirmation.

I think as my Brother Angel has said here and I think all of the brothers and sisters of the Bar that have been involved in this case, this **[39]** has been nothing but a torturous case.

Mr. Angel has indicated that he has been with this case since 1991. This case has been here almost as long as my six month tour of duty here, which started in 1990.

First of all, it's beyond peradventure that settlements can be contained in a Plan of Reorganization. I just cite one case for that, 138 BR in re Drexel Burnham Lambert. Everybody who objected to the procedure used this appeal. It was affirmed by the District Court and then by the Second Circuit Court of Appeals.

It's beyond peradventure that we can certainly approve settlements within a Plan of Reorganization.

Even more so, I mean the due process issue has been raised. If anything, a Disclosure Statement and then a vote is even more due process than Rule 9019 because typically in a 9019 motion you get your twenty days' notice. Sometimes that's not enough. Here there's been at least forty-five days' notice, minimum. At least forty-five days' notice.

In reference to the Disclosure Statement and the plan, I haven't calculated how long **[40]** it is but it's at least double. If you wish to have specific findings, something that's two times more notice is obviously two times better than normal notice, at least that's how an accountant would look at it.

In reference to the specific objections, the one to the Pension Benefit Guaranty settlement which is incorporated in the Plan of Reorganization, the objections are really easily disposed of.

First of all, if they were done in secret, these were not done in secret. If anything, the Court has been one of the pushing hands constantly scheduling status conferences and pretrial hearings on the objections to claims, et cetera, pushing the Pension Benefit Guaranty Corporation and the Debtor to a settlement.

Then, I don't know where the direction came from, whether it came from the bench or from the parties, but it was agreed that it would be put into the Debtor's joint Disclosure Statement and Plan of Reorganization which was filed on January 26, 1994 which is about five months ago.

The former Debtors in reference to **[41]** their due process had their opportunity back in March, I don't recall the exact date, but it was somewhere in March when the Disclosure Statement was approved and accordingly I think there has been no denial of due process.

As to the provisions that are—the objections that are raised in reference to the provisions, the test, really in reference to a settlement, has been enunciated in any number of cases.

I know again in the Drexel Burnham case and the TMT Trailer case it lists the criteria, but the criteria simply put is the probability of success, the difficulties in collection, the complexity of litigation, expense and convenience and I think most of all, is the paramount interest of creditors here.

I think in this particular case, I think two of those factors are certainly important. This is not to denigrate the complexity of an ERISA litigation, because I can't think of anything more arcane than the practice of ERISA pension law.

Maybe somebody would be as arcane as practicing bankruptcy law and immigration law **[42]** together, maybe. So it's difficult, but the probability of success here, the Debtor would have had based upon this Court's knowledge of the Pension Benefit Guaranty situation in this case, it's clear that Infotechnology here was—they had a controlling interest and they satisfied the control test in reference to UPI, so there is some liability here. In fact, there is probably more than some liability.

So the issue then becomes what is the business judgment and how would this effect the creditors of this estate.

This settlement with the Pension Benefit Guaranty Corporation clearly benefits the creditors of this committee's estate. So their paramount interests are being satisfied.

Finally, I have to give a proper deference to the business judgment of the Debtor here. I don't believe in this case that

the Debtor's business judgment falls below that minimum standard.

It's not my obligation as a Judge to interfere with the Debtor's business judgment but only when it falls below the minimum standard necessary to approve the settlement. So the [43] objections to the PBGC settlement and the Plan of Reorganization is denied and overruled.

In reference to the objection filed by Mercury Partners, Paul Steinle and John F. Berentson, first of all, I think the due process argument, again, has clearly been addressed in reference to the Pension Benefit Guaranty Corporation.

I don't think we have to go into that matter in reference to this objection because I think, again, due process has been more than satisfied.

The director, the objections of the directors, first of all, is—and these are their principal objections and I summarized them, is that Avacus is improperly vested with the right to prosecute the Avacus lawsuit in violation of Delaware law and the sharing arrangement.

Second, the Avacus lawsuit violates the Delaware law since it fails to advance litigation expense to the directors or the Defendants in this case, which phrased another way is that I think the directors are claiming in advance that they won't be indemnified, which means they are saying we are going to lose this lawsuit, that's what I read the [44] objection to be.

And then the third is the plan's treatment of the indemnification claims as improper. Let's take the easy ones first.

The indemnification classification is clearly proper. Every case that has come before this Court, and I think every Bankruptcy Judge in the country typically has indemnification claims and classifies them separately and they have all been treated as prepetition claims.

That also has been affirmed—this particular Judge has been affirmed on that at least a dozen times in the Drexel Burnham case exactly on the issue of indemnification claims and prepetition claims and how they are classified. I was affirmed so much on that issue that I lost track of it.

The second issue is in reference to the failure to advance the litigation expenses. As far as I know, there is no requirement that these expenses be advanced under Delaware law.

I have not been cited to any statute that tells me that Delaware law would require them to be advanced. What Delaware law requires, if it is available, is that if the directors have these type **[45]** of expenses and they were required to pay them out after the lawsuit is finished, then they get reimbursed and that's assuming they win.

In this particular case, the Avacus lawsuit involves, there are causes of action which the Court has reviewed which if they succeed Delaware law would prevent indemnification. So I don't think there is any reason for the Debtor here or in this case Avacus or anyone to advance any proceeds. I think that objection is also without merit.

In reference to the specific law in Delaware about having Delaware law, I think the cite was that it's prevented from having this resolved in the Bankruptcy Court. I think the Delaware Code section, I think it's Section 303 of Delaware law specifically provides that Federal law will overrule and if it comes within a Plan of Reorganization, then the Bankruptcy Court can approve that and then Delaware law is inapplicable.

Then we come down again to the best interest of creditors and the Debtor and the probability of success. Avacus has successfully on, I believe, two occasions in this case prevented the Debtor from having a Disclosure Statement approved.

[46] Now, as a matter of experience, and I don't profess to be the most experienced Bankruptcy Judge in the country, I am not, although according to the Administrative Office of the United States I ranked forty-five in seniority.

The fact of the matter is the Debtor here in this case had two Disclosure Statements not approved. In my experience after that happens the cases are usually converted or dismissed.

However, I think the parties through, I think, the urging of the Court here, and as I recall it's probably almost a year ago

when we met downstairs in some courtroom, I think it was Judge Lifland's courtroom where I think I broke a few arms and I think that the Debtor and Avacus threw a lot of rocks at at each other as I recall.

Even after they reached the settlement, as I also recall they still could not agree upon what they reached. Then they submitted to me what they thought they had reached and then I issued orders saying what I thought the agreement was. I think that even happened one more time.

MR. SILVERSTEIN: A lot of rocks, Your Honor.

[47] THE COURT: A lot of rocks.

When a Court reviews, particularly if the Court has some participation in the settlement process, you get a feel for the complexity of the litigation that's involved here and the expense and the inconvenience and delay.

Again, that's one of the factors in the—of the TMT Trailer case and there is no doubt that if the Debtor and Avacus had not come to a settlement we would not be here today having a confirmation hearing.

The next issue in looking at the settlement is what is going to be the interest of the Debtor and the creditors here and the expense?

There really is no expense to the estate here and the reorganized Debtor, there isn't any. As Mr. Frankel has said, I believe Mr. Silverstein said that—

MR. SILVERSTEIN: Your Honor, it's Mr. Angel.

THE COURT: Mr. Angel, I keep forgetting. I apologize.

MR. ANGEL: It takes ten years off my age or fifteen years.

[48] THE COURT: I know your first name better from yelling at you enough.

In any event, the interest of the creditors here and the Debtor are really paramount. The purpose of Chapter 11 is to reorganize. The essence of Chapter 11 is to reorganize. The essence of Chapter 11 is negotiation and compromise.

When you come into a Chapter 11 case, except in very rare circumstances, it is always a lose, lose situation and in this particular case the Debtor is in a win, win situation.

There is no expense to them and there is the upside possibility, which counsel for the objectors pointed out, maybe there is a different agenda, maybe Avacus has an agenda and maybe his clients are judgment proof, I don't know that and that's really not for me to decide today whether it is a losing proposition in terms of money.

What is clear here is that the Debtor, A, has no expense in this situation and B, has the probability of sharing in something.

But any individual, any man or woman, who has practiced law knows that it's very easy to win judgments, it's very difficult to collect them.

I'm sure many of the counsel who are **[49]** sitting here today could be like myself when I was in private practice, I could wallpaper my wall with all the judgments that my clients never collected, but that's no reason not to pursue a lawsuit.

It may be a practical reason to discontinue. In this case it's not for me to make that judgment, because the TMT factors are satisfied in this case.

I also approved the settlement of the Avacus lawsuit litigation and the right of the Debtor to sell that lawsuit and literally in a sense sell it because that's what has been done here to Avacus and I approved the settlement because it satisfies the TMT factors test.

The last one was the objection of American Community Services. They are not here today but I think to make the record complete, this Court was also the Judge that handled and approved the Financial News Network Plan of Reorganization.

It is clear that American Community Services Network, Inc. was included in that settlement and, therefore, they are not even a claimant in this case, so their objection is overruled for reasons of no standing and the fact **[50]** that they

have already been governed by the Financial News Network case.

Having resolved all the objections and having heard the report of the ballots and the offer of proof made by Mr. Angel on behalf of the Debtor, this Court finds that the Plan of Reorganization satisfies the requirements of 1129(a) and is confirmed.

MR. ANGEL: Thank you very, very much.

THE COURT: The hearing is concluded.

MR. ANGEL: May I hand up an Order?

THE COURT: Yes.

MR. HIRSH: Your Honor, could I just see that Order that is being handed up?

THE COURT: Yes. Thank you, counsel.

[51]

CERTIFICATE

I, DENISE L. DANIELS, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth, and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

DENISE L. DANIELS
Denise L. Daniels

(2)

No. 95-1298

Supreme Court, U.S.
F I L E D
MAR 19 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: INFOTECHNOLOGY, INC., A Delaware Corporation,

Debtor.

JOHN S. ABELES; EARL W. BRIAN; DWIGHT W. GEDULDIG; JOHN E. KOONCE; WALLACE O. SELLERS; PAUL STEINLE; and JOHN BERENTSON,

Petitioners,

—v.—

INFOTECHNOLOGY, INC.,

Debtor-Respondent,

PENSION BENEFIT GUARANTY CORPORATION and AVACUS PARTNERS, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DEBTOR-RESPONDENT'S BRIEF IN OPPOSITION

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32 pp

QUESTIONS PRESENTED

1. Whether fifty (50) days notice of a hearing to consider final approval of a preliminary settlement agreement known as the Avacus Stipulation and Order incorporated for final approval in a plan of reorganization is violative of 11 U.S.C. § 1129(a)(3) of the Bankruptcy Code or Rule 9019(a) of the Federal Rules of Bankruptcy Procedure.

2. Whether the Bankruptcy Court, in applying the standards announced in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct 1157 (1968), abused its discretion when it approved a settlement between the Pension Benefit Guaranty Corporation and Infotechnology, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1298

IN RE: INFOTECHNOLOGY, INC., A Delaware Corporation,

Debtor.

JOHN S. ABELES; EARL W. BRIAN; DWIGHT W. GEDULDIG; JOHN E. KOONCE; WALLACE O. SELLERS; PAUL STEINLE; and JOHN BERENTSON,

Petitioners,

—v.—

INFOTECHNOLOGY, INC.,

Debtor-Respondent,

PENSION BENEFIT GUARANTY CORPORATION and AVACUS PARTNERS, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DEBTOR-RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

In addition to the statutes, rules, or regulations cited by Petitioners in their Petition for Writ of Certiorari, the following statutes and rules are relevant to this case:

Section 1123(b)(3)(A) of the Bankruptcy Code, 11 U.S.C. § 1123(b)(3)(A), authorizes a proposed settlement agreement to be incorporated in a plan of reorganization for a Bankruptcy Court to review and give final approval at a hearing on confirmation.

Rules 9019(a) and 2002(a)(3) of the Federal Rules of Bankruptcy Procedure require notice to, among others, all creditors, for approval of a settlement on no less than twenty (20) days notice.

STATEMENT OF THE CASE

On March 5, 1991, Infotechnology, Inc. ("Infotech") and its wholly-owned subsidiary Questech Capital Corporation ("Questech") (Infotech and Questech are collectively referred to as the "Debtors") each filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Debtors were authorized to continue in the operation and management of their respective businesses as a debtor-in-possession.

On April 18, 1994, the Bankruptcy Court approved the Debtors' Joint Disclosure Statement (the "Disclosure Statement") as containing adequate information within the meaning of Section 1125 of the Bankruptcy Code and, *inter alia*, fixed a date for effectuating service of the Disclosure Statement and the third joint plan of reorganization (the "Plan") pursuant to Rules 2002 and 3017 of the Federal Rules of Bankruptcy Procedure. The Bankruptcy Court further sched-

uled a confirmation hearing to take place on June 21, 1994 to consider final approval of the Avacus stipulation and order (the "Avacus Stipulation and Order"), the Pension Benefit Guaranty Corporation term sheet (the "PBGC Term Sheet"),[1] and confirmation of the Debtors' Plan (the "Confirmation Hearing").

Copies of the Plan, and its exhibits (including the Settlement Agreements) were transmitted to all interested parties including, but not limited to, John H. Ables, Earl W. Brian, Dwight W. Geduldig, John E. Koonce, Wallace Sellers, Paul Steinle, and John F. Berentson (collectively, the "Petitioners").

The Petitioners filed timely objections to the Settlement Agreements and the Plan. The Bankruptcy Court overruled the objections and authorized final approval of the Settlement Agreements. The Debtors' Plan was confirmed by Order dated June 21, 1994, and entered on the Bankruptcy Court's docket on June 23, 1994 (the "Confirmation Order").

The Petitioners appealed the Confirmation Order to the United States District Court for the Southern District of New York which affirmed the Bankruptcy Court's Confirmation Order in open Court in all respects. Attached as Appendix "A" in the Appendix of this brief is a true and correct copy of the District Court bench opinion which was omitted from Petitioners' Appendix in their Petition for Writ of Certiorari (App., *infra*, 1a). Petitioners then appealed to the United States Court of Appeals for the Second Circuit which, by Summary Order filed on November 9, 1995, affirmed the District Court's Order affirming the Bankruptcy Court's Confirmation Order. A petition for a writ of certiorari ensued.

---

[1] The Avacus Stipulation and Order and the PBGC Term Sheet are collectively known as the "Settlement Agreements". The Settlement Agreements are an integral part of the Plan.

A. THE AVACUS LAWSUIT

Infotech and five of its present or former directors are defendants in a shareholder derivative action entitled *Avacus Partners, L.P. v. Earl W. Brian, M.D., et al.*, Civil Action No. 11001, filed in the Court of Chancery of the State of Delaware in and for New Castle County (the "Avacus Lawsuit"). Avacus Partners, L.P. ("Avacus") filed an unsecured proof of claim in the Infotech proceeding in the amount of $24,767,996.00 (the "Avacus Claim").

Prior to the commencement of the bankruptcy proceeding, a special committee of the Infotech board concluded that the Avacus Lawsuit was without merit, and recommended no action be taken or pursued on behalf of Infotech.

Although the Avacus Lawsuit was automatically stayed upon Infotech's filing for Chapter 11 relief, Infotech and Avacus enjoyed a rather hostile relationship and engaged in other protracted adversarial proceedings during the bankruptcy.

In July of 1993, in what has been described as a "win-win" situation for Infotech, Infotech agreed to settle their dispute with Avacus regarding the Avacus Claim. In essence, the Avacus Stipulation and Order provided that upon the Confirmation Order becoming a Final Order, as defined in the Plan, Infotech will allow Avacus to prosecute and/or settle the Avacus Lawsuit at its sole cost and expense in exchange for a full release of the Avacus Claim against Infotech. Additionally, should Avacus obtain a recovery from its claims arising under the Avacus Lawsuit, Infotech would receive fifty percent of that recovery net of the expense of prosecution post-confirmation.

Given the contentious prior relationship between Avacus and Infotech, the parties requested that the Court "So Order" the settlement stipulation on a preliminary basis. As "So Ordered", the stipulation was binding to themselves. It provided a means for going forward with confirmation of the

Plan. On November 22, 1993, the Bankruptcy Court, as an accommodation to the settling parties (i.e. Infotech and Avacus), "So Ordered" the settlement. In so doing, the Court clearly reserved to itself final approval of the settlement in the context of a Plan Confirmation Hearing.

The Avacus Stipulation and Order clearly provided that it was to be incorporated in its entirety as an integral part of the Plan. The Avacus Stipulation and Order further provided that it would become operative upon its approval by "Final Order", as defined in the Plan. Additionally, as an express condition to the Avacus Stipulation and Order becoming effective, the "Effective Date", as defined in the Plan (ie. "the First Business Day after the Confirmation Order becomes a Final Order"), must occur. A further condition imposed under the Avacus Stipulation and Order prior to it becoming effective is a requirement that the Bankruptcy Court find that the Avacus Stipulation and Order is binding on Infotech and its estate, creditors and shareholders. Absent approval by Final Order of the Bankruptcy Court at the Confirmation Hearing, neither the Plan nor the Avacus Stipulation and Order are effective.

The Avacus Stipulation and Order is Exhibit "7" to the Plan. Infotech, as required, sought final approval of the Avacus Stipulation and Order by means expressly authorized by the Bankruptcy Code, *i.e.* by incorporating and making the settlement part of the Plan ultimately to be voted upon by all interested parties. In voting on the Plan, one voted for or against the Avacus Stipulation and Order as well as the Plan.

B. THE PBGC TERM SHEET

The Pension Benefit Guaranty Corporation (the "PBGC") filed two (2) claims aggregating over $10,100,000 in the Infotech Chapter 11 case emanating from its ownership of United Press International, Inc. ("UPI")[2] and UPI's under-

[2] UPI filed for Chapter 11 relief on August 28, 1991 in the United States Bankruptcy Court for the Southern District of New York as a

funded pension plan (the "Pension Plan"). The PBGC contended that Infotech was a "contributing sponsor" of the UPI Pension Plan (within the meaning of ERISA § 4001(13)) or a member of the contributing sponsor's "controlled group" (within the meaning of ERISA § 4001(a)(14)). Infotech thoroughly investigated the PBGC's contentions and determined that the PBGC's claims would not likely be defeated. Infotech and the PBGC subsequently entered into settlement negotiations which culminated in an agreement known as the PBGC Term Sheet.

The PBGC Term Sheet allows for the PBGC to receive, in full settlement of its allowed claims: (i) 196,000 shares of AMASYS Series "A" Preferred Stock, (ii) 645,000 AMASYS Warrants, (iii) 50% of the net recovery to Reorganized Infotech from the UPI Claim,[3] and (iv) the PBGC Notes. The PBGC Notes are in the total face amount of $1,500,000 secured by AMASYS assets. Accordingly, this settlement is quite favorable to Infotech's estate.

The Bankruptcy Court was presented with the PBGC Term Sheet for its consideration and approval at the Confirmation Hearing. The Bankruptcy Court conducted a thorough analysis of the PBGC Term Sheet under the *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct 1157 (1968) ("*TMT Trailer*") standards and found that the settlement was in the best interests of the estate and in the best business judgment of Infotech.

"related" case to the reorganizations of Infotech and Financial News Network, Inc. On May 17, 1994, the Honorable Francis G. Conrad converted the UPI Chapter 11 case to a case under Chapter 7.

[3] Infotech filed a claim against UPI in the amount of $33,657,074.00 for management fees, notes, loans, advances, interest, indemnification, and claims related to the UPI underfunded pension plan. UPI is believed to be administratively insolvent and the likelihood of a return is, at best, speculative.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. INFOTECH HAS COMPLIED WITH ALL REQUIREMENTS OF THE BANKRUPTCY CODE AND HAS VASTLY EXCEEDED THE DUE PROCESS REQUIREMENTS AS PROVIDED FOR BY RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Infotech has safeguarded Petitioners due process rights by vastly exceeding all notice requirement standards mandated by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Petitioners cannot claim that their due process rights have been violated nor can Petitioners claim that they did not have a "meaningful" opportunity to object to the Avacus Stipulation and Order and the Plan at the Confirmation Hearing.

Congress has expressly authorized the incorporation of a settlement agreement into a plan of reorganization. Section 1123(b)(3)(A) of the Bankruptcy Code states as follows:

> **Contents of plan.**
>
> (b) Subject to subsection (a) of this section, a plan may—
>
> (3) provide for—
>
> (A) the settlement or adjustment or any claim or interest belonging to the debtor or to the estate;

11 U.S.C. § 1123(b)(3)(A). Indeed, it is common practice for settlement agreements to be incorporated into a plan of reorganization. Courts interpreting Section 1123(b)(3)(A) do not challenge the appropriateness of this procedure and continue to recognize this as well established law. *See In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493 (Bankr. S.D.N.Y. 1991) (held, compromises or settlements may be effected sep-

arately during reorganization or in body of reorganization itself); *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279 (Bankr. S.D.N.Y. 1990)(held, settlements forming part of Chapter 11 plan of reorganization may be approved by a bankruptcy court only if "fair and equitable"). Moreover, Petitioners do not challenge the appropriateness of this methodology.

Rules 9019(a) and 2002(a)(3) of the Federal Rules of Bankruptcy Procedure specifically address the notice required to effect due process. Rule 9019 of the Federal Rules of Bankruptcy Procedure is clear and states:

> (a) **Compromise.** On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Rule 2002(a)(3) of the Federal Rules of Bankruptcy Procedure provides for twenty (20) days notice by mail of a hearing on approval of a compromise or settlement of controversy. Not only were the aforementioned statutory requirements met, they were vastly exceeded.

The Disclosure Statement and the Plan were served upon *all* parties in interest on no less than *fifty (50)* days notice. Pursuant to an Order dated April 18, 1994 (the "Disclosure Statement Scheduling Order"), the Bankruptcy Court specifically ordered the form and manner of notice of the Confirmation Hearing and expressly decreed that such notice be deemed good and sufficient notice. The Petitioners, as interested parties, enjoyed ample opportunity to review the documents, and to make an informed decision on whether to vote for or against the Plan which incorporated in their entirety the Settlement Agreements.[4]

---

[4] The Plan was overwhelmingly approved by all persons who voted. The Petitioners did not vote.

Although Petitioners did not vote on the Plan, they did object to the confirmation of the Plan citing the Avacus Stipulation and Order. The Petitioners objected that they did not have an opportunity to be heard at a "meaningful time" or in a "meaningful manner" because the Avacus Stipulation and Order was presented as a *fait accompli*. Petitioners objections were heard and overruled. As noted above, the Avacus Stipulation and Order was without meaning or effect absent the confirmation of the Plan. Creditors were given notice of the proposed Avacus Stipulation and Order and the Plan through Infotech's Plan solicitation process. The total creditor body voted overwhelmingly in favor of the Plan. Notwithstanding Petitioners contentions that they did not have a "meaningful hearing", the Bankruptcy Court heard the Petitioners' objections at the Confirmation Hearing, addressed each objection offered, overruled each objection, approved the Avacus Stipulation and Order, and confirmed Infotech's Plan. Although their objections were not sustained, the Petitioners due process rights were always protected. As the Second Circuit stated:

> . . . the November 1993 ruling was a preliminary order, binding only as between Avacus and Infotech, the only parties to the stipulation, and was expressly conditioned upon confirmation of the plan by final order of the Court. Such a ruling was not improper. Moreover, we agree with the District Court that, even if there were any error in the Bankruptcy Court's approval of the Avacus Stipulation, such error was harmless. As a result of the settlement, the Debtor resolved a claim against the Estate and was absolved of all expenses relating to a lawsuit that it found not worthy of pursuit, yet was guaranteed fifty percent of the recovery if the lawsuit succeeded. To reject such a favorable settlement would have been an abuse of discretion on the part of the Bankruptcy Court.
>
> Since appellants concede that compliance with Rule 9019 provides all the process that is due, appellant's

> claim that they were denied due process fails. Moreover, appellants' property interests were not impaired until after the Confirmation Hearing, by which time they had received notice and a hearing, thus granting them all the process they were due.

(Petitioners' App., at 3a).

Petitioners argue that the settlement negotiations were conducted in "secret" and that interested parties were excluded from any participation or review of the settlement process. The Court of Appeals for the Second Circuit has held that not all parties have a right to be involved in a settlement process. *In re Drexel Burnham Lambert Group, Inc.*, 995 F.2d 1138, 1145 (2d Cir. 1993). In any event, no where in the record on appeal can Petitioners demonstrate any evidence indicating that the proposed Avacus Stipulation and Order was accomplished in "secret" or that the Petitioners were somehow barred from asserting an objection. The disclosure of the proposed Avacus Stipulation and Order to be finally approved at the Confirmation Hearing, as discussed above, was open, notorious, and exhaustive and to which the Petitioners responded. Accordingly, the Petitioners were afforded more than adequate due process as required by Rules 9019(a) and 2002(a)(3) of the Federal Rules of Bankruptcy Procedure and had their day in court. Accordingly, Petitioners were not denied due process.

B. THE BANKRUPTCY COURT PROPERLY OBSERVED AND APPLIED THE SUPREME COURT STANDARDS IN APPROVING THE PBGC TERM SHEET

The Bankruptcy Court was presented at the Confirmation Hearing with a proposed settlement by and between Infotech and the PBGC. The Bankruptcy Court conducted a thorough analysis of the merits of the PBGC Term Sheet under the *TMT Trailer* standards and found that the settlement was in the best

interests of the estate and in the best business judgment of Infotech. Notwithstanding the Bankruptcy Court's analysis, Petitioners contend that the Bankruptcy Court's decision in approving the PBGC Term Sheet at the Confirmation Hearing was in conflict with the settlement standards announced by this Court.

TMT Trailer clearly sets forth the standard which bankruptcy courts employ in approving proposed settlement agreements. Under the standards of *TMT Trailer*, a bankruptcy court is required to make an "informed and independent" judgment as to whether proposed compromises are fair and equitable. *TMT Trailer*, 390 U.S. 414, 424, 88 S.Ct 1157, 1163. However, the Bankruptcy Court should not substitute its judgment for that of the debtors-in-possession. *Depo v. Chase Lincoln First Bank, N.A.*, 77 B.R. 381, 384, *aff'd*, 863 F.2d 45 (2d Cir. 1980). Nor is a mini-trial on the merits required for court approval. *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991). Moreover, it is the responsibility of the bankruptcy judge, and the appellate courts upon review, not "to decide the numerous questions of law and fact raised by [objections] but rather to canvass the issues to see whether the settlement fall[s] below the lowest point in the range of reasonableness". *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) *cert. denied, Cosoff v. Rodman*, 464 U.S. 822, 104 S.Ct. 89 (1983), *quoting Newman v. Stein*, 464 F.2d 689, 693 (2d. Cir. 1972) *cert. denied, Benson v. Newman*, 409 U.S. 1039, 93 S.Ct. 521 (1972). At the same time, the court must bear in mind that "the law favors compromise". *In re Heissinger Resources, Ltd.*, 67 B.R. 378, 383 (C.D. Ill. 1986).

As noted earlier, the PBGC filed two (2) proof of claims in the Infotech case based upon Infotech being a "contributing sponsor" of the UPI Pension Plan or a member of the contributing sponsor's "controlled group". Twenty-six U.S.C. § 414(c) of the Internal Revenue Code is controlling to determine whether or not Infotech is within the UPI control group.

The Internal Revenue Code then references to Treasury Regulation Section 1.414(c)-2(b)(2)(A). This section provides that "controlling interest" means:

> In the case of the organization which is a corporation, ownership of stock possessing at least 80 percent of the total combined voting of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation.

Treasury Regulation Section 1.414(c)-2(b)(2)(A).

At the time that it executed the PBGC Term Sheet, Infotech had reasonably determined that it was indeed, at all relevant times, a member of the UPI control group. In fact, Infotech determined that it held approximately ninety-nine percent (99%) of the voting power in UPI. Infotech further determined that attempting to adjudicate this matter before the Bankruptcy Court carried significant risk and was likely to thwart its reorganizational goals. Accordingly, Infotech sought to settle the $10,100,000.00 PBGC claim. Employing its business judgment, Infotech successfully settled with the PBGC and substantially reduced its liability.

Notwithstanding Infotech's favorable settlement with the PBGC, Petitioners contend that because the PBGC had not selected a termination date for the UPI Pension Plan as of the date the Bankruptcy Court approved the PBGC Term Sheet, the Bankruptcy Court could not assess the strength of the PBGC's position and therefore did not conduct a proper review of the settlement. However, Infotech did not need to know the exact termination date of the UPI Pension Plan. Infotech used its business judgment and concluded that at all relevant times, Infotech would have a "controlling interest" and thus, a liability which would likely devastate any possibility of reorganization if Infotech did not settle with the PBGC. In addition, Infotech was well aware that it did not have any influence in choosing the UPI Pension Plan termi-

nation date and correctly concluded that the PBGC would choose a date in which Infotech had a controlling interest. Accordingly, Infotech determined that litigating with the PBGC would be a costly and futile endeavor.

The Bankruptcy Court, as it noted itself, played an active role in resolving the dispute and was completely familiar with the facts and circumstances and terms and conditions of the PBGC Term Sheet. (Petitioners' App., at 40a-41a). Accordingly, the Bankruptcy Court was more than able to reach an objective and informed evaluation of the strength of the PBGC's position based upon the facts which it knew exceptionally well. The Bankruptcy Court applied the facts of this case and specifically and appropriately addressed the PBGC Term Sheet under the standards as clearly announced in *TMT Trailer* to determine whether the terms of the PBGC Term Sheet settlement fell below the range of reasonableness. (Petitioners' App., at 41a-42a). Like the Avacus Stipulation and Order, the Bankruptcy Court properly authorized the approval of a settlement which substantially reduced Infotech's liability and concluded that the settlement did not fall below the lowest level of reasonableness.

In addressing Petitioners concerns, the United States Court of Appeals for the Second Circuit concluded:

> In establishing the termination date, only the interests of PBGC and the plan participants are taken into consideration. *See In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 652 (2d Cir. 1983). Knowing it had no legal role in selecting the plan termination date, Infotech made a reasonable business judgment that the termination date selected would likely be a date during which time Infotech was liable for the Pension Plan.

* * *

> Furthermore, the only additional fact appellants list as necessary for an informed decision by the Court is a fixed date for plan termination. The Court did not need to know that date in order to approve the compromise.

(Petitioners' App., at 4a-5a).

Accordingly, the Bankruptcy Court properly authorized the approval of the PBGC Term Sheet by applying the *TMT Trailer* standards and examining the "best interests of the estate" to determine whether the settlement fell below the lowest level of reasonableness. The Bankruptcy Court found that the PBGC Term Sheet was in the best interests of the estate and authorized its approval. In employing the teachings of *TMT Trailer*, the Bankruptcy Court did not abuse its discretion in approving the PBGC Term Sheet.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 6201 (LAK)

March 6, 1995

10:35 a.m.

IN RE: INFOTECHNOLOGY, INC., a Delaware Corporation,

Debtor,

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

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BY: ROBERT A. ABRAMS

* * *

[51] THE COURT: I am ready to rule on this matter.

If you bear with me, parts of this will not be as fluent as I would like, but I think it will get the job done.

These are consolidated appeals from the Bankruptcy Court confirming the plan of reorganization of Infotechnology. The appellants are five present or former directors of Infotechnology as well as three other creditors, Mercury Partners and two other individuals associated with it.

The central issues pertain to the future of the derivative action in which the director appellants are defendants and the treatment of their claims for indemnification with respect to that lawsuit. There are also issues raised with respect to a settlement between the debtor and the Pension Benefit Guaranty Corporation.

The derivative suit that I referred to was commenced in 1989 by Avacus Partners, a limited partnership, in the Delaware Chancery Court, against Infotech and the five directors who are appellants in this case. That case is entitled Avacus Partners versus Brian.

The Avacus case has been stayed since 1991 by the automatic stay provisions of the Bankruptcy Code, but presumably will come to life when Infotechnology emerges from bankruptcy. After the filing of the bankruptcy **[52]** petition, Avacus filed a proof of claim against the debtor in the amount of approximately $25 million and, by virtue of that claim, became one of the significant players in the reorganization process.

The PBGC was another key party by virtue of its having asserted claims in excess of $10 million in respect of alleged unfunded pension liabilities with respect to the pension plan of United Press International, which allegedly was controlled by Infotechnology at relevant times.

Infotechnology's efforts to devise an acceptable plan of reorganization initially met with failure. In May of 1992 and again in February of 1993, it filed proposed disclosure statements and plans of reorganization. They were opposed by Avacus and the PBGC, and on both occasions, the Bankruptcy Court denied approval of the disclosure statement. It does appear that Infotechnology concluded that it would be necessary to make peace with Avacus and the PBGC in order to have any chance of a successful reorganization.

On May of 1993, Infotechnology and the PBGC reached an agreement in principle on the PBGC claims. The agreement is set out in a document called the PBGC Term Sheet that appears at pages 297 to 304 of the record. It contemplated, in essence, that PBGC would receive a combination of notes with a face value of one and a half **[53]** million dollars as well as certain securities and warrants to purchase securities in the reorganized debtor. That agreement was expressly conditioned upon the approval by the Bankruptcy Court of a plan of reorganization that contained the material terms of the PBGC Term Sheet.

While the chronology is not particularly material, it appears that Infotechnology turned its attention to Avacus after it reached its agreement with the PBGC. Its efforts culminated in a document that contains the terms of the deal between Infotechnology and Avacus, the central provisions of which will be spoken about in a minute. The document appears at pages 285 to 295 in the record, but I pause for a moment to comment on the nature and circumstances of the settlement document.

The document bears the caption of the bankruptcy case and is entitled Stipulation and Order. It is not signed on behalf of either party. It is not dated except that it bears the notation "9/28/93" in a line on the first page that contains what appears to be a word processing code. The disclosure statement in the Bankruptcy Court says that the settlement was entered into on July 9, 1993, almost three months before the apparent date on the first page. The document was "so ordered" by the Bankruptcy judge on November 22, 1993. It

is not disputed that the Bankruptcy Court so ordered the document without any notice to **[54]** creditors, without affording any opportunity for the creditors to object, and without any hearing. Furthermore, the appellants have asserted, and none of the appellees has denied, that the settlement was negotiated in the Bankruptcy Judge's chambers with substantial participation by the court.

The material terms of the Avacus settlement are essentially these:

First, Avacus was given the exclusive right to prosecute the derivative suit on behalf of the debtor at the sole expense of Avacus with Avacus and the debtor each to receive one-half of the net recovery, if any.

Second, in the event that the Delaware Chancery Court determines that Infotechnology is obliged to indemnify any of the directors for any judgment or settlement in the derivative suit, both Avacus and the debtor waive the right to any such recovery to the extent it would create an indemnification liability on the part of Infotech. In other words, Avacus and Infotechnology agree to produce any judgment or settlement that might be obtained against the directors to the extent that Infotechnology otherwise would be obliged to indemnify the directors for that liability.

Third, in the event the Chancery Court of Delaware determines that Infotechnology is obliged to indemnify any of the director appellants in this case for **[55]** defense costs with respect to derivative suit, the appellants are entitled to only a prepetition, unsecured claim against Infotechnology and that claim is subject to allowance as to the amount allowed by the Bankruptcy Court.

Fourth, the Stipulation referred to the intention of the parties, that is Infotechnology and Avacus, to make the Stipulation a part of a plan of reorganization that Infotechnology then intended to file with the Bankruptcy Court. It set forth various provisions that Infotechnology agreed to include, and it contained Avacus' agreement to support the plan that Infotechnology then intended to present.

Fifth, among the provisions to be incorporated in the plan was the creation of a reserve of 345,000 shares of the common stock of the reorganized debtor. In the event any of the directors is found by the Delaware Chancery Court to be entitled to indemnification for defense costs with respect to the derivative suit, any allowed claim thus arising is to be satisfied only from the reserve fund and only at the rate of one share of stock per $10 of allowed claim.

Lastly, on the Settlement Date, and that phrase is a defined term in the agreement, Avacus' claim against Infotech shall be withdrawn.

Thus, to boil it all down, Infotechnology appears **[56]** to have bought off the Avacus claim and lined up its support for the plan of reorganization in exchange for one half of the value of its own claim against its own directors, if any.

It bears noting that the Stipulation and Order, one might argue, was not contingent upon approval of a plan of reorganization, a subject I will return to.

While the parties did express in the document the intention that it be included in a plan that Infotechnology then intended to present, certain aspects of the Stipulation and Order are unconditional and speak in the present tense; and thus indicate an intention that they would take effect immediately. Some of those include the agreement to support the proposed plan, which counsel for the debtor has acknowledged it was binding unconditionally as of the date the Stipulation and Order was so ordered by the Bankruptcy Judge. Others, including the provision that gives Avacus sole control of the conduct of the derivative suit, while unconditional and speaking in the present tense, are provisions which Avacus and the debtor contend were conditioned upon the plan of confirmation being approved and confirmed and the order of confirmation becoming final.

As I say, the debtor and Avacus argue that the terms of the Stipulation and Order which are pertinent here were conditioned on the plan becoming effective and being **[57]** confirmed. They point to various language in the document, including a variety of defined terms that I needn't allude to

now, because they were the subject of colloquy. Suffice it to say that one could certainly have expressed that view a lot more clearly than the document expressed it. For example, it was expressed with great clarity, the very same concept, in the PBGC Term Sheet.

In any case, on January 31, 1994, Infotechnology filed a proposed disclosure statement and plan that contained both the Avacus stipulation and the PBGC Term Sheet. The appellants, all of them, contend that they had no prior notice of the Avacus and PBGC Settlements and certainly no participation in the negotiations of which those settlements were the products.

There was a hearing on the disclosure statement in March. The disclosure statement was approved on April 18, and in due course, the appellants filed objections to the plan in May and June 1994. The Bankruptcy Court held a hearing on June 21, 1994 at which the objections were heard and rejected, and the order appealed from was entered later on June 21, 1994.

Now, the principal attack leveled here is that the Bankruptcy Judge approved both the Avacus settlement and the PBGC settlement without notice and without opportunity to be heard on the part of the appellants in this case in **[58]** violation of Bankruptcy Rule 9019 and the alleged rights of the appellants to due process of law. Consideration of this issue, I think, is best undertaken against the context in which negotiations such as those at issue here and reorganizations in complex matters like this take place.

It is, I think, a commonplace, and certainly no one has suggested otherwise in the course of this morning's argument, that is complicated Chapter 7 matters plans of reorganization are in fact negotiated primarily between the major parties to the reorganization and do not include all of the creditors or all of the parties in interest. In fact, as the Second Circuit made clear in one of the Drexel decisions, we would seldom have a plan of reorganization in a complex matter if indeed all of the creditors had to be involved in every stage of the proceedings. I take it, although there was some perhaps contrary suggestion in the papers filed by the appellants, that the appellants don't

really dispute that this morning. So that to the extent that there is an objection here based on the assertion that the appellants were not given a place at the bargaining table with respect to the Avacus or the PBGC settlement, I take it as withdrawn and in any case it lacks merit.

Now, we also had here quite obviously as we do in many major reorganization proceedings extensive participation by the Bankruptcy Judge charged with the **[59]** matter in the settlement process. That too is, as I think I may have said a moment ago, quite common. There was, at least in my experience, one respect in this case in which it differed from that which is commonplace, and that is that the Bankruptcy Judge here "so ordered" the Stipulation and Order between Avacus and Infotechnology, although that is not so of the PBGC Term Sheet.

Now, one can readily understand the concerns that are put forward on behalf of the appellants in view of the so ordering of the Stipulation and Order by the Bankruptcy Judge.

The purpose of Rule 9019 is to insure that parties in interest be given an opportunity to comment upon proposed settlements and compromises of disputes between a debtor and others before the court places its imprimatur on the deal, whereas here the Bankruptcy Court appears to have granted that imprimatur in circumstances in which the appellants had no idea of what was taking place, no idea of what the deal was or indeed that there was a deal, and no opportunity to comment to or attempt to influence the Bankruptcy Judge at the point where he so ordered the stipulation. There is an appearance of a possibility that the court had committed itself in a substantive way to the transaction embodied in the Stipulation and Order. Moreover, having regard to the realities of the **[60]** reorganization process, the appellants quite fairly comment that as arrangements are made with one major creditor constituency and then another, putting in place, building blocks, moving toward having a confirmation of a plan, the process acquires a momentum that makes it difficult or at least apparently difficult for anyone objecting to the plan that emerges from these negotiations to have any influence. And

the risk of course is, or the concern rather advanced by the appellants is, that by the time they had a chance to say anything on the subject of the Avacus settlement, the Bankruptcy Judge who had previously so ordered the stipulation was sufficiently committed to getting a reorganization done that what took place at the hearing of the confirmation of the plan was more form than substance.

If I were persuaded that the Bankruptcy Court in so ordering the Stipulation and Order had in fact committed itself to the substance of the compromise embodied in that document, I would not hesitate to upset the plan even at this late date, momentum or no momentum. I am satisfied that I should not do so in this case for two reasons:

First of all, I am reasonably confident that the Avacus settlement with Infotechnology was, as the appellees claim, contingent on the occurrence of a confirmed plan, the occurrence of the Settlement Date, as that term is used in the Stipulation and Order.

[61] While the drafting of the document leaves something to be desired from this point of view, I am moved by two considerations. The first and the most important by far is the fact that the provision of the stipulation and order which obligates Avacus to withdraw the $25 million claim against the estate of the debtor is expressly conditioned upon the occurrence of the Settlement Date. Had that not been so, had the withdrawal of the claim been effective or arguably effective as of the date of the stipulation, we might well have reached a different result in this case.

Secondly, with regard to the difficulties in the drafting of the document, I must say that I have before me all of the parties to the document. They all tell me what it meant. It is a reasonable interpretation. Indeed, I am hard-pressed to figure out a different one. There is no evidence to the contrary.

Therefore, I conclude that the deal in fact was contingent on a confirmed plan of reorganization.

That being the case, it seems to me that I have to accept that the Bankruptcy Judge regarded himself as free to evaluate the plan of reorganization on its merits at the time it was

put forward to take into consideration the objections that were put forward on behalf of the appellants and to deal with them appropriately on the merits.

[62] While it might well have been preferable, even if only from an appearance standpoint, for the Stipulation and Order not to have been so ordered, I think in the last analysis, the Bankruptcy Judge must be presumed to have considered the plan on the merits when it was presented for confirmation.

I am buttressed in reaching this result by the fact that, in my view, any error with respect to the notice, if error there was, was harmless, given the fact that I am inclined to the view that a rejection of this settlement by the Bankruptcy Judge would have been an abuse of discretion and improper.

This was, as one of the counsel put it in the hearing on plan confirmation, a win, win situation for the debtor. The debtor bought off a claim against the assets of the estate in the amount of $25 million. I assume, though, it makes no difference to my ruling, that this was a vastly exaggerated claim, exaggerated for the purpose that many creditors holding unliquidated and contingent claims exaggerate in bankruptcy. Nevertheless, there was at least, in theory, some exposure to the estate.

The debtor got rid of that claim for a 50 percent interest in the net recovery in a derivative suit which the debtor, by virtue of an independent board committee, previously had concluded was not worth pursuing. That being **[63]** the case, it bought off something of arguably some value, that is, a claim of some value against the assets of the debtor in exchange for a 50 percent interest in an asset that the debtor had concluded was substantially worthless. Under those circumstances, I can't see how the Bankruptcy Court could have failed to approve the settlement.

I take note of the various points of Delaware law that are raised with respect to the claimed illegality of the settlement. I regard the Delaware law points as frivolous and the Bankruptcy Code points directed at the same issue, namely, whether it was appropriate to vest control over the derivative action in Avacus, as without merit. I take what was done here

as no different from the debtor writing a check on its bank account. It has the right to do that. It has the right to assign an interest in a claim and, in consequence, I see nothing in the Delaware General Corporation Law that is at cross-purposes with this settlement.

Now, that takes me to the PBGC claim for the claim alleging the PBGC's settlement.

The first argument is the assertion parallel to that with respect to the Avacus settlement: That the Bankruptcy Court approved the settlement without notice and opportunity to be heard. I regard the question that was posed in the context of the Avacus settlement as interesting **[64]** and somewhat troublesome. I regard this one as neither.

Here it is perfectly clear that the PBGC Settlement was contingent upon a confirmed plan, and there is not even the ghost of an argument that the Bankruptcy Judge committed himself to the substance of the PBGC settlement in anything remotely approaching the so ordered stipulation on the Avacus settlement. The opportunity that the appellants had with respect to notice and a hearing upon plan confirmation was all they were entitled to with respect to the PBGC settlement.

There is a claim also that the approval of the PBGC settlement was improper. I may not use in the context of this bench opinion all of the right bankruptcy buzz words, but the substance of the claim is that the Bankruptcy Judge failed adequately to consider the merits of the settlement. The appellants argue that the PBGC was unfairly overcompensated because in their view, the claim of the PBGC was far too weak to justify the settlement that it receives under the plan.

Now, all of this hinges on the question of whether the debtor is liable for the unfunded pension liabilities of UPI, Inc.

It is undisputed that the debtor, as of June 27th, 1992, which in due course became the plan termination date, was the holder of more than 80 percent of the shares **[65]** of UPI, Inc. The regulations adopted and that are applicable here provide a bright line test that measures control, upon which the liability of the debtor, for the unfunded pension liability,

turns, solely in terms of 80 percent share ownership. In consequence, if the determination of the plan termination date by the PBGC was valid and controlling, the appellants, quite apart from any issues of scope of review, acknowledge that they are dead in the water because the debtor was on the hook for 100 percent of the underfunded pension liability.

Now, I recognize that my scope of review on this point is very narrow, and I don't mean to depart in any way from that. I talk about the merits here only because they are so clear that on any view of any scope of review, even de novo, this argument is a dead loser for the appellants.

The basic argument, as I understand it, is that the plan termination date is the product of a plan termination, which itself was the result of an agreement between the Chapter 7 trustee of UPI, Inc. and the PBGC, and it is that agreement that produces the June 27th, 1992 date. I gather that the argument is that the agreement, in order to terminate the plan effectively, had to be an agreement between the PBGC and the plan administrator. The difficulty, of course, is that by the time this occurred—the termination of the plan—there was no plan **[66]** administrator. UPI was in a Chaptcr 7 proceeding under the Bankruptcy Code. The agreement was then made with a Chapter 7 trustee, and as I understand the law, and I refer to the Fifth Circuit case that I thought I had with me a moment ago, was In Re: Esco.

MR. RICKETT: PBGC versus trustees, bankruptcy trustee of Esco Manufacturing.

It's In the matter of E-S-C-O, Esco Manufacturing Codebtor: Pension Benefit Guaranty Corp. versus Prichard, 33 F.3d 509, decided by the Fifth Circuit last year.

Under that case, it seems to me quite clear that the agreement to terminate in these circumstances between the Chapter 7 trustee and the PBGC was effective given that conclusion and given the appellants' acknowledgment during the argument that although the planned termination had not occurred at the time Judge Conrad confirmed the plan, the fact of the plan termination must be taken into account in

deciding these appeals. I regard this as being no colorable claim with respect to the PBGC settlement.

For all of the foregoing reasons, I affirm the order confirming the plan of reorganization. Gentlemen, is there anything that I have missed that I ought to say a word about? None.

Then I reserve the right to make any editorial changes that seem appropriate. But the foregoing is the **[67]** decision of this court. Thank you all.

MR. ANGEL: Thank you very much, your Honor.

MR. SILVERSTEIN: Thank you. your Honor.

MR. LUSKIN: Thank you, your Honor.

No. 95-1298

Supreme Court, U.S.
FILED
MAR 21 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: INFOTECHNOLOGY, INC.,
A DELAWARE CORPORATION,

Debtor.

JOHN S. ABELES; EARLW. BRIAN; DWIGHT W. GEDULDIG;
JOHN E. CAINCA; WALLACE O. SELLERS;
PAUL STEINLE; AND JOHN BERENTSON,

Petitioners,

v.

INFOTECHNOLOGY, INC.,

Debtor-Respondent,

PENSION BENEFIT GUARANTY CORPORATION
AND AVACUS PARTNERS, L.P.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Bankruptcy Court, which considered and rejected Petitioner-Creditor's objections to the Plan of Reorganization ("Plan") after notice, written submissions and a hearing, commit reversible error by approving, without notice to Petitioner-Creditors, a preliminary settlement between Debtor and another creditor that was expressly conditioned on confirmation of and incorporation into the Plan, despite the Second Circuit's undisputed conclusion that the Bankruptcy Court could not have rejected the settlement without abusing its discretion?

2. Does *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968), require reversal of the Bankruptcy Court's decision, after carefully examining all relevant facts at hand, to confirm the Plan, which included the compromise of a dispute between Debtor and the Pension Benefit Guaranty Corporation ("PBGC") concerning Debtor's liability for the pension plan of a 99%-owned subsidiary, merely because a plan termination date had not been chosen prior to confirmation of the Plan and despite undisputed proof -- the subsequent choice of a termination date -- that PBGC's claim against Debtor was legitimate?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1298

IN RE: INFOTECHNOLOGY, INC.,
A Delaware Corporation
Debtor.

JOHN S. ABELES; EARL W. BRIAN;
DWIGHT W. GEDULDIG; JOHN E. KOONCE;
WALLACE O. SELLERS; PAUL STEINLE;
and JOHN BERENTSON,
Petitioners,

v.

INFOTECHNOLOGY, INC.,
Debtor-Respondent,

PENSION BENEFIT GUARANTY CORPORATION
and AVACUS PARTNERS, L.P.,
Respondents.

BRIEF IN OPPOSITION

Respondent Avacus Partners, L.P. ("Avacus") respectfully requests that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Petitioners John S. Abeles, Earl

W. Brian, Dwight W. Geduldig, John E. Koonce, Wallace O. Sellers, Paul Steinle and John Berentson.

I. STATEMENT

On November 9, 1995, Chief Judge Jon O. Newman entered a Summary Order on behalf of a unanimous panel of the Second Circuit affirming the March 7, 1995 judgment of the District Court, which in turn had affirmed the June 23, 1994 order of the Bankruptcy Court confirming the Chapter 11 reorganization plan of Debtor Infotechnology, Inc. ("Infotech" or "Debtor"). All three lower courts squarely and unanimously rejected the very same arguments that Petitioners ask this Court to entertain.

A. The Avacus Action

Petitioners are former members of the Board of Directors of Infotech and defendants or potential defendants (Steinle and Berentson) in a derivative action pending in the Delaware Chancery Court captioned *Avacus Partners, L.P. v. Brian,* Civil Action No. 11001 (the "Avacus Action"). Pet. at 4-5; Jt. App. at 718-63.[1] The Avacus Action alleges that Infotech's former directors, through two transactions, exchanged stock in Infotech valued at more than $21 million for stock and securities worth at most $300,000 in entities the directors themselves controlled. *Id.* Infotech appointed a special committee to review the derivative claims, which

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[1] Citations to the Petition for Writ of Certiorari will be made to "Pet." Citations to the Joint Appendix submitted by the parties to the Second Circuit will be made to "Jt. App."

recommended that the claims not be pursued by Infotech. Pet. at 5. However, in 1990, Chancellor Allen denied defendants' motion to dismiss the Avacus Action, finding that the provable allegations demonstrated that the consideration that Infotech received in the two transactions was "so inadequate that no person of ordinary, sound business judgment would deem it worth that which the corporation paid." *Avacus Partners, L.P. v. Brian*, Civil Action No. 1101, slip op. at 15 (Del. Ch. Oct. 24, 1990).

B. The Bankruptcies of Infotech and UPI

On March 5, 1991, Infotech filed for protection from creditors under Chapter 11 of the Bankruptcy Code. Pet. at 3. Shortly thereafter, the Avacus Action was stayed. *Id.* at 5. Avacus filed a proof of claim for approximately $25 million in the Infotech bankruptcy, asserting the claims it was prosecuting in the Avacus Action. Jt. App. at 377-78.

At the time of its bankruptcy, Infotech was the parent of United Press International, Inc. ("UPI"). On August 28, 1991, UPI also filed for protection from creditors under Chapter 11 of the Bankruptcy Code. It is undisputed that at various times during and prior to the UPI bankruptcy Infotech owned or controlled virtually all of UPI's voting stock. In particular, on June 27, 1992, Infotech controlled 99% of UPI's voting stock. Pet. at 5a. On October 14, 1994, PBGC and UPI entered into an agreement that terminated UPI's pension plan and established June 27, 1992 as the plan termination date. Jt. App. at 970-74.

C. PBGC's Claims

In 1991 and 1992, the Pension Benefit Guaranty Corporation ("PBGC") filed ERISA claims against Infotech amounting to more than $10 million for minimum funding contributions and unpaid benefit liabilities owing to UPI's pension plan. Jt. App. at 156-58. PBGC alleged that Infotech was liable for UPI's deficiencies under 29 U.S.C. § 1362(a), which imposes liability, in certain circumstances, on an entity that is, "on the termination date" of the pension plan, a member of the "controlled group" of the plan's sponsor. Jt. App. at 156-62. ERISA provides that "controlled group" means all entities "under common control," and further that "common control" has the same meaning as that given by regulations prescribed by the Secretary of the Treasury under subsections (b) and (c) of section 414 of Title 26. 29 U.S.C. § 1301(a)(14). Those Treasury regulations in part provide that two entities are under "common control" if one has an ownership interest of 80% or greater in the other. Treas. Reg. 1.414(c)-2(b)(2).

D. The Bankruptcy Proceedings

On May 26, 1992, Infotech filed its first disclosure statement and proposed plan of reorganization. PBGC and Avacus both objected to the disclosure statement. As a result, the Bankruptcy Court did not approve it.

On February 3, 1993, Infotech filed a second disclosure statement and proposed plan of reorganization. Once again, Avacus and PBGC objected, and once again, the Bankruptcy Court denied approval.

In the Spring of 1993, the Bankruptcy Court urged Infotech, Avacus and PBGC to settle their disputes. After protracted negotiations, and with the help of the Bankruptcy Court, the parties finally reached agreements in principle to resolve their differences. Both agreements were contingent on approval of the Third Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Infotechnology, Inc. and Its Affiliated Debtor, Questech Capital Corporation (the "Plan" or "Reorganization Plan") by the Bankruptcy Court. Petitioners did not participate in these negotiations and concede that they did not have a right to participate in them. Jt. App. at 1187.

The agreement between Infotech and PBGC was reached in May, 1993. The terms of their agreement were set out in a document captioned the "PBGC Term Sheet." Jt. App. at 389-96. Under the PBGC Term Sheet, PBGC will receive certain notes with a face value of $1.5 million, preferred shares in the Debtor as reorganized and warrants. *Id.*

Avacus and Infotech reached an agreement in principal to settle their dispute in August, 1993. However, as a result of the history of hostility between Avacus and Infotech, the parties had considerable difficulty reducing the terms of their agreement to writing. The parties' drafting disputes ultimately were resolved by an agreement on the terms of their settlement (the "Avacus Stipulation") that was "so-ordered" by the Bankruptcy Court on November 22, 1993. Jt. App. at 377-87. Like the PBGC Term Sheet, the Avacus Stipulation was contingent on approval by the Bankruptcy Court of the Reorganization Plan. *Id.* at 384, ¶ 19. The Avacus Stipulation provided generally that the $25 million claim against Infotech's estate would be resolved,

that Avacus would bear the costs of the Avacus Action and that in return Avacus would receive from any recovery it obtained its legal expenses plus 50% of the remaining recovery. *Id.* at 377-87. Petitioners did not receive notice of the Avacus Stipulation before it was "so-ordered" by the bankruptcy Court. Pet. at 6.

The PBGC Term Sheet and the Avacus Stipulation were incorporated into drafts of the Reorganization Plan and disclosure statement dated on or about January 31, 1994. *See* Jt. App. at 1238; 99-594. Thereafter, notice was sent to Petitioners and all interested parties of a hearing that was held on March 10, 1994, to consider the adequacy of the disclosure statement. Petitioners chose not to file any objections to the disclosure statement, not to participate in the March 10 hearing and not to vote on the Plan. *See* Jt. App. at 595. The Bankruptcy Court later approved the Debtors' Joint Disclosure Statement to Debtors' Third Joint Plan of Reorganization Pursuant to § 1125 of the Bankruptcy Code and the Reorganization Plan.

The Bankruptcy Court then set a confirmation hearing for June 21, 1994, to consider confirmation of the Plan. Copies of the Plan and its exhibits, including the Avacus Stipulation and the PBGC Term Sheet, were transmitted to Petitioners and all interested parties approximately fifty days prior to the June 21 confirmation hearing. Petitioners filed written objections to the Plan and to the terms of the Avacus Stipulation and the PBGC Term Sheet and participated in the confirmation hearing. The Bankruptcy Court addressed and overruled each of Petitioners' objections and confirmed the Plan in an order filed June 23, 1994 (the "Confirmation Order"). Pet. at 8a-47a. However, the Reorganization Plan does not take effect -- and therefore the Avacus Action

remains stayed -- until all appeals from the Confirmation Order are exhausted. *See* Jt. App. at 8-9.

E. District Court and Second Circuit Proceedings

Petitioners appealed from the Confirmation Order to the United States District Court for the Southern District of New York. Among other things, Petitioners alleged that they were denied due process because the Bankruptcy Court violated Rule 9019(a) of the Federal Rules of Bankruptcy by failing to notify Petitioners of the Avacus Stipulation before it was "so-ordered" by the Court.[2] The District Court disagreed, finding that the Avacus Stipulation was a preliminary settlement, "contingent on the occurrence of a confirmed plan," Jt. App. at 1241, and that Petitioners received adequate notice and opportunity to object to the terms of the Avacus Stipulation through the Confirmation Hearing and attendant proceedings. *Id.* at 1239-42. The District Court further found that even if the District Court had violated Rule 9019 by "so-ordering" the Avacus Stipulation without notice to Petitioners, such error was

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[2] Rule 9019(a) states:

> On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

Fed. R. Bankr. P. 9019(a). Bankruptcy Rule 2002(a) provides that the requisite amount of notice is twenty days. Fed. R. Bankr. P. 2002(a).

harmless, because rejection of the Avacus Stipulation by the Bankruptcy Court would have been an abuse of discretion. *Id.* at 1243.

Petitioners also challenged approval of the Plan based on the terms of the PBGC Term Sheet. Petitioners argued, as they do here, that "[t]he failure of the PBGC to terminate the UPI pension plan as of the date of the confirmation hearing made it impossible for the Bankruptcy Court to properly evaluate the PBGC's contention that Infotech was in UPI's 'controlled group.'" Pet. at 15. According to Petitioners, this fact prohibited the Bankruptcy Court from making the "informed and independent judgment" about the Plan that is required by *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) ("*TMT Trailer Ferry*"). *Id.* The District Court likewise dismissed this objection, ruling that "on any scope of review, even *de novo*, [that] argument is a dead loser" for Petitioners. Jt. App. at 1246.

The Second Circuit unanimously and summarily affirmed the District Court's rulings. Writing for the panel, Chief Judge Newman found that the Bankruptcy Court did not violate Rule 9019 in "so-ordering" the Avacus Stipulation, because it "was a preliminary order" and "was expressly conditioned upon confirmation of the [P]lan by final order of the Court." Pet. at 3a. The Second Circuit also agreed that even if "so-ordering" the stipulation was error, it was harmless:

> As a result of the settlement, the Debtor resolved a claim against the Estate and was absolved of all expenses relating to a lawsuit that it found not worthy of pursuing, yet was guaranteed fifty percent of the recovery if the lawsuit succeeded. To reject such a

favorable settlement would have been an abuse of discretion on the part of the Bankruptcy Court.

Id.

Finally, the Second Circuit rejected Petitioners' claims relating to the PBGC Term Sheet. Judge Newman found that the Bankruptcy Court did not need to know the UPI pension plan termination date in order to approve the Reorganization Plan. Pet. at 5a. He reasoned that Infotech had "no legal role in selecting the [UPI pension] plan termination date" and thus it was reasonable for Infotech and the Bankruptcy Court to conclude "that the termination date selected would likely be a date during which time Infotech was liable for the Pension Plan." *Id.* at 4a-5a. Therefore, "[t]he Bankruptcy Court did not abuse its discretion in approving the compromise, based on its decision that Infotech's assessment of the risk of liability was reasonable." *Id.* at 5a.

II. REASONS FOR DENYING THE PETITION

The petition is frivolous. Petitioners challenge parts of the process by which the Bankruptcy Court confirmed the Reorganization Plan, but the alleged procedural defects are insufficient to alter the ruling that they ask this Court to reverse. Petitioners seek review of the Bankruptcy Court's decision to "so-order" a preliminary settlement between Avacus and Infotech that the District Court and Second Circuit held to be at worst harmless error, yet they do not challenge the rulings on harmlessness. Likewise, Petitioners complain that the Bankruptcy Court did not wait for the UPI pension plan to be terminated before approving the settlement between Infotech and PBGC. Yet Infotech's assumption that a date would be set at a point in time when Infotech was liable for the UPI plan, which the Bankruptcy accepted as a reasonable business judgment, turned out to be

correct. Quite simply, Petitioners seek review of Bankruptcy Court actions that have been mooted either by subsequent rulings that they do not dispute or by factual developments that they cannot dispute.

Petitioners' challenges lack interest even as procedural footnotes. A Bankruptcy Court violates no rule of law by arbitrating disputes between debtor and creditor; on the contrary, arbitration of those disputes is an integral part of the Bankruptcy Court's role. By "so-ordering" the Avacus Stipulation, the Bankruptcy Court facilitated a deal that permitted Infotech to draft an acceptable Reorganization Plan, into which the Avacus Stipulation was incorporated. The settlement embodied by the Avacus Stipulation and the Plan itself were subject to final approval only after Petitioners were afforded concededly ample due process. Thus, no claim was compromised before Petitioners had their day in court.

There is even less reason to second-guess the Bankruptcy Court's judgment that the PBGC Term Sheet was a reasonable compromise of PBGC's claim against Infotech for deficiencies owed under the UPI pension plan. Petitioners provide no support for their radical contention that a Bankruptcy Court cannot settle a claim with a value that will be affected by a future event -- here, the choice of a termination date for the UPI pension plan -- until that event comes to pass. Neither *TMT Trailer Ferry* nor any other case cited by Petitioners so holds. Moreover, the unprecedented duty that Petitioners seek to impose on Bankruptcy Courts would severely hamper their ability to conclude reorganizations and would lead to irrational and unwarranted delays. The Bankruptcy Court carefully examined the facts at hand and concluded that the PBGC Term Sheet was a reasonable and proper compromise. He was required to do no more and no less.

The total absence of merit in the Petition strongly suggests that it is aimed not at the bankruptcy court proceeding that it seeks to reverse, but at the Avacus Action, where Petitioners are defendants and potential defendants, and which cannot resume until all appeals of the Confirmation Order are resolved. The Petition should be denied.

A. The Alleged Procedural Defects Are Moot

1. Petitioners do not contest that any error by the Bankruptcy Court in connection with the Avacus Stipulation was harmless.

The Second Circuit and District Court affirmed the Bankruptcy Court's ruling with respect to the Avacus Stipulation on two independent grounds. In addition to finding that the Bankruptcy Court did not violate Rule 9019, both lower courts held that even if there was such a violation it was harmless error. Pet. at 3a; Jt. App. at 1238-44.

Avacus and Infotech spent nearly three years negotiating a compromise of Avacus's $25 million claim against Infotech's bankruptcy estate. The Avacus Stipulation resolved that claim against the estate. Moreover, as both the District Court and the Second Circuit noted, the Avacus Stipulation lifted the burden of all expenses relating to the Avacus Action from the shoulders of Infotech, yet at the same time guaranteed Infotech 50% of the recovery if Avacus prevailed. *Id.* The Avacus Stipulation was undoubtedly a "win-win situation" for Infotech. Jt. App. at 1243.

Under the circumstances, the Second Circuit and the District Court held not only that the Bankruptcy Court was correct in accepting the Avacus Stipulation as part of the Plan, but also that the Bankruptcy Court would have abused

its discretion had it failed to accept the agreement. Pet. at 3a; Jt. App. at 1243. For this reason, the lower courts concluded, any error resulting from the Bankruptcy Court's decision to "so-order" the Avacus Stipulation was harmless. *Id.*

Petitioners challenge neither the harmless error ruling nor the predicate finding that rejection of the Avacus Stipulation would have been an abuse of discretion. *See* Pet. at 10-14. The failure to challenge those rulings belies Petitioners' assertion that "the impact on these petitioners of the disregard of their right to prior notice of the approval of the [Avacus Stipulation] was substantial." Pet. at 13. In fact, the ruling that Petitioners seek would not affect the result below. Examination of an exercise of the Bankruptcy Court's statutory mandate to resolve claims against the estate that at worst amounted to harmless error is hardly a "special and important reason[]" to grant this Petition for Writ of Certiorari. *See* Sup. Ct. R. 10.1.

2. ***Petitioners cannot complain that the Bankruptcy Court was mistaken in accepting Infotech's judgment about the UPI pension plan termination date, since the subsequent choice of a termination date proved that Infotech was correct.***

Petitioners assert that by approving the PBGC Term Sheet as incorporated into the Reorganization Plan the Bankruptcy Court violated its duty to make an "informed, independent judgment" about the proposed compromise of PBGC's claim under *TMT Trailer Ferry*. *See TMT Trailer Ferry*, 390 U.S. at 424 (quoting *National Surety Co. v. Coriell*, 289 U.S. 426, 436 (1933)); Pet. at 14-17. Petitioners' sole rationale for this contention is that "[t]he failure of the PBGC to terminate the UPI pension plan as of

the date of the confirmation hearing made it impossible for the Bankruptcy Court to properly evaluate the PBGC's contention that Infotech was in UPI's 'controlled group.'" Pet. at 15.

All agree that under ERISA and applicable regulations, Infotech's liability for UPI's pension plan turned on whether it was in UPI's controlled group on the date of termination of the UPI pension plan. Pet. at 14-15; *see* 29 U.S.C. §§ 1362(a), 1301(a)(14); *see also* Treas. Reg. 1.414(c)-2(b)(2). Petitioners concede that the relevant "regulations provide that two companies are under common control if one has a direct or indirect ownership interest of 80 percent or more in the other." Pet. at 15. Since the UPI pension plan had not been terminated on the day the Reorganization Plan was to be confirmed, the unanswered question was whether Infotech would be within UPI's controlled group once the date of termination of the UPI pension plan was set.

As competing creditors of Infotech, Petitioners contend that PBGC received too much consideration in return for the compromise of its claim. *See* Pet. at 15-16; *see also* Brief for Appellants, *In Re Infotechnology, Inc.*, No. 95-5024 (2d Cir. June 9, 1995) ("App. Br.") at 26-40. Petitioners are deliberately opaque about how lack of knowledge of the UPI pension plan termination date affected the value of PBGC's claim. They assert cryptically that "different points in time have different implications for Infotech with regard to Infotech's alleged control of UPI," Pet. at 15, but they never spell out those implications. This calculated omission is necessitated by the subsequent choice of the plan termination date, a fact that also is conspicuously absent from Petitioners' briefing.

The UPI pension plan termination date, June 27, 1992, was chosen several months after the Reorganization Plan was confirmed. Jt. App. at 970-74. Petitioners do not

and cannot dispute that on June 27, 1994, Infotech controlled 99% of the voting stock of UPI, Pet. at 5a, more than enough to make Infotech and UPI part of the same "controlled group" under Petitioners' own reading of the law. Thus, whether or not the Bankruptcy Court correctly evaluated the merits of the compromise at the time the Reorganization Plan was confirmed, any doubts about the merit of PBGC's claim arising from uncertainty about the termination date were laid to rest when the date was chosen. Petitioners have nothing left to complain about and review by this Court under the circumstances is wholly unwarranted.

B. The Bankruptcy Court Did Not Err in Approving Infotech's Reorganization Plan

1. Petitioners were given more than adequate notice and opportunity to be heard under Bankruptcy Rule 9019 and the Due Process Clause.

Petitioners are wrong in asserting that this case will permit the Court "to address whether [Bankruptcy] Rule 9019 requires prior notice to interested parties of a settlement . . . that affects their property rights." Pet. at 11. In fact, Petitioners were given notice and two opportunities to object to the Avacus Stipulation before it took effect, the first of which they forwent. *See* Jt. App. at 595. As the Second Circuit held, the Avacus Stipulation was a "preliminary order" that "was expressly conditioned upon confirmation of the [Reorganization Plan] by final order of the Court." Pet. at 3a. Petitioners do not contest this factual finding. In light of the resulting concession that the Avacus's claim (and thus their "property interest," Pet. at 13) was not compromised until the Plan was confirmed after

adequate notice and a hearing, Petitioners cannot explain how the Bankruptcy Court violated Rule 9019 or their due process rights by "so-ordering" the Avacus Stipulation.[3]

Rather, Petitioners' briefing betrays that Rule 9019 and due process are merely cover for their true gripe with the Bankruptcy proceedings. They complain that "the Bankruptcy Judge himself [] participated in crafting" the Avacus Stipulation, while Petitioners were "totally excluded" from "the secret settlement process." Pet. at 12-13. But Rule 9019 and the Due Process Clause did not entitle Petitioners to participate in the settlement negotiations between Infotech and Avacus, nor did they prohibit the Bankruptcy Court from facilitating that process. There is no authority of any kind to support those propositions. On the contrary, "a bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the [Bankruptcy] Code." *In Re Lionel Corp.*, 722 F.2d 1063, 1069 (2nd Cir. 1983).

Petitioners' due process arguments are coextensive with and indistinguishable from their arguments under Rule 9019. They do not contend that Rule 9019 provides less due process than required under the Due Process Clause. Either

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[3] The only case cited by Petitioners in support of their claim that they have a property interest under the Due Process Clause, *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293 (1953), expressly notes that due process attach only to "judicial denial of a party's claimed rights." *Id.* at 297. There was no "judicial denial" of Petitioners' rights until the Plan was confirmed after notice and hearings.

the Bankruptcy Court violated Rule 9019 or it did not; there is no due process issue.[4]

2. *The Bankruptcy Court did not abuse its discretion in approving the PBGC Term Sheet.*

TMT Trailer Ferry requires a bankruptcy court to make an "informed, independent judgment" about whether a proposed compromise of a claim against the estate is "fair and equitable." *TMT Trailer Ferry*, 390 U.S. at 424. That is exactly what the Bankruptcy Court did before approving the PBGC Term Sheet as part of the Reorganization Plan. Contrary to Petitioners' suggestion, there was no "blind adherence to the Debtor's business judgment." Pet. at 16-17. The Bankruptcy Court examined the probability that the PBGC would succeed in its claim against Infotech, the difficulties in collecting a judgment and the complexity, expense and inconvenience of the potential litigation in light of "the paramount interest of creditors," before concluding that the PBGC Term Sheet was a reasonable settlement of PBGC's claims. Pet. at 41a-42a; *see also* Pet. at 33a-38a.

As the Second Circuit found, the Bankruptcy Court "played an active role in resolving the PBGC dispute with

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[4] Petitioners invoke the requirement of 11 U.S.C. § 1129(a)(3) that a Chapter 11 plan can only be confirmed if "the plan has been proposed in good faith and not by a means forbidden by law." Pet. at 11. The Petition, however, does not appear to allege bad faith. Since the Plan was "proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirements of section 1129(a)(3) [were] satisfied." *See In Re McCormick*, 49 F.3d 1524, 1526 (11th Cir. 1995).

Infotech and was completely familiar with the facts and circumstances of the PBGC settlement." Pet. at 5a. In particular, the following facts informed the Bankruptcy Court's decision: (a) at about the time UPI filed a Chapter 11 petition, Infotech controlled 99% of UPI's voting stock;[5] (b) Infotech had no legal role in choosing the UPI pension plan termination date; (c) PBGC asserted that it would choose a termination date for the UPI pension plan on which Infotech controlled more than 80% of UPI's voting stock; (d) Infotech believed that it would likely be found liable for the deficiencies in the UPI pension plan. *See* Pet. at 4a-5a. This was enough to make an informed, independent judgment.

Petitioners nevertheless assert, citing *TMT Trailer Ferry*, that it was beyond the Bankruptcy Court's discretion to approve the PBGC Term Sheet because the termination date for the UPI pension plan had not been chosen yet: "The failure of the PBGC to terminate the UPI pension plan as of the date of the confirmation hearing made it *impossible* for the Bankruptcy Court to properly evaluate the PBGC's contention that Infotech was in UPI's 'controlled group.'" Pet. at 14-17 (emphasis added). Petitioners therefore maintain that *TMT Trailer Ferry* prohibits a bankruptcy court from approving a settlement of any claim that is in some way contingent on the occurrence of a future event.

Petitioners have distorted *TMT Trailer Ferry* beyond recognition. In that case, the decision of the Bankruptcy

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[5] Petitioners hint that the amount of UPI voting stock controlled by Infotech "was the subject of dispute." Pet. at 16. Although they did challenge the import of control of 99% of UPI's voting stock below, *see* App. Br. at 31-37, they do not make that argument in this Petition. They have never challenged the fact that Infotech indeed controlled 99% of UPI's voting stock during the relevant time period.

Court was reversed because "there [was] no explanation of how the strengths and weaknesses of the debtor's cause[] of action were evaluated or upon what grounds it was concluded that [the settlement] . . . was 'fair and equitable.'" *TMT Trailer Ferry*, 390 U.S. at 434. Here, by contrast, the issue is whether, having examined all of the relevant facts at hand, the Bankruptcy Court may approve a settlement despite the existence of unfulfilled contingencies that might have an impact on the strength of the settled claim. *TMT Trailer Ferry* did not require the Bankruptcy Court to have at its disposal all "facts necessary to determine whether Infotech was responsible as a matter of law for UPI's pension obligations," as Petitioners aver. Pet. at 15. On the contrary, the Bankruptcy Court "was not required to decide the merits of every issue underlying" PBGC's claims, but only to "satisfy itself that the [s]ettlement was within the range of reasonableness." *In Re Best Products Co.*, 68 F.3d 26, 33 (2nd Cir. 1995); *see also* Pet. at 4a; *In Re Energy Cooperative, Inc.*, 886 F.2d 921, 929 (7th Cir. 1989).

Neither *TMT Trailer Ferry* nor any other case supports Petitioners' radical position that approval of the compromise of a claim is "impossible" if all facts necessary to resolve the claim as a matter of law have not yet come to pass or are not known to the parties. Such a rule would hopelessly deadlock bankruptcy proceedings. Worse, to impose a standard that required, in effect, judicial resolution of claims before settlements could be approved would frustrate the most important purpose of settlement, *i.e.*, to resolve claims without judicial intervention. Petitioners' proposed standards are unworkable, as is their Petition.

III. CONCLUSION

For the foregoing reasons, Respondent Avacus Partners, L.P. respectfully requests that the Petition for a Writ of Certiorari to the Second Circuit be denied.

Respectfully submitted.

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